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May 1

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VOL. 2—LANDING. N. Y. SU-
PERIOR COURT REPORTS.

may 1

10

REPORTS OF CASES

ARGUED AND DETERMINED

4

IN THE

New York (State)
SUPREME COURT,

OF THE

STATE OF NEW YORK.

BY ABRAHAM LANSING,
COUNSELOR-AT-LAW.

VOLUME II.

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DURING THE YEAR 1870.

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DANIEL P. INGRAHAM.† GEORGE G. BARNARD.
JOHN R. BRADY.

Second District.

JOSEPH F. BARNARD.† ABRAHAM B. TAPPEN.
JASPER W. GILBERT. CALVIN E. PRATT.

Third District.

CHARLES R. INGALLS. RUFUS W. PECKHAM.†
HENRY HOGEBOOM.† THEODORE MILLER.

Fourth District.

ENOCH H. ROSEKRANS.† AUGUSTUS BOCKES.
PLATT POTTER. AMAZIAH B. JAMES.

Fifth District.

HENRY A. FOSTER. LEROY MORGAN.
JOSEPH MULLIN.† CHARLES H. DOOLITTLE.

Sixth District.

RANSOM BALCOM.† JOHN M. PARKER.
DOUGLASS BOARDMAN. WILLIAM MURRAY, JR.

Seventh District.

E. DARWIN SMITH.* JAMES C. SMITH.
THOMAS A. JOHNSON.† CHARLES C. DWIGHT.

Eighth District.

RICHARD P. MARVIN.† GEORGE BARKER.
JOHN L. TALCOTT. CHARLES DANIELS.

The justices whose names were marked thus † were presiding justices until the reorganization of the court under the amended judiciary article of the Constitution.

Those whose names are marked thus * were sitting in the Court of

Appeals until July 4th, when the Court of Appeals, organized under that article, went into operation.

‡ Judge PECKHAM was elected a judge of the Court of Appeals in May, and resigned his position in the Supreme Court, his resignation taking effect July 4th; and WILLIAM L. LEARNED was appointed to fill the vacancy occasioned by his resignation.

JUSTICES OF THE GENERAL TERM.

PURSUANT TO APPOINTMENT BY THE GOVERNOR UNDER CH. 408 OF THE LAWS OF 1870.

First department, DANIEL P. INGRAHAM, presiding justice; ALBERT CARDOZO, GEORGE G. BARNARD, associate justices.

Second department, JOSEPH F. BARNARD, presiding justice; JASPER W. GILBERT, ABRAHAM B. TAPPEN, associate justices.

Third department, THEODORE MILLER, presiding justice; PLATT POTTER, JOHN M. PARKER, associate justices.

Fourth department, JOSEPH MULLIN, presiding justice; THOMAS A. JOHNSON, JOHN L. TALCOTT, associate justices.

MARSHALL B. CHAMPLAIN, Attorney-Genera..

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CASES ADJUDGED
IN THE
SUPREME COURT
OF THE
STATE OF NEW YORK.

CHARLES B. GILMAN, Appellant, v. GEORGE F. GILMAN and EDWARD McCLELLAN, Executors, &c., WINTHROP W. GILMAN and others, legatees, &c., of NATHANIEL GILMAN, deceased, Respondents.

ANNA K. GILMAN, Appellant, v. THE SAME, Respondents.

(GENERAL TERM, FIRST DISTRICT, JANUARY 1870.)

Executors directed by the testator to invest in United States government stocks, State, city or town securities, or upon bonds and mortgages, whatever funds they might from time to time have in hand, awaiting the period for disbursement according to the provisions of the will, invested small sums, but retained in hand large average balances for several years, holding them on deposit to their individual credit, and in their names as executors, and in different banks, shifting the deposits from one bank to another, and in part, using the same for accommodation of one or more of their number.

Held, they were chargeable with interest on the balances, after allowance of reasonable time for investment, and were not excused from its payment, because of objection by some of the distributees to investments in United States securities; or of difficulty in obtaining investment in bond and mortgage, or of any right to keep the moneys in readiness to pay over to the parties entitled, pending proceedings for distribution, and notwithstanding the legatees, &c., had not informed the executors of any opportunity to invest in proper securities.

Gilman v. Gilman.

Accordingly, they were charged with interest at six per cent, on the sums held by them at the end of every half year, after allowing thirty days to make investments.

And, Per INGRAHAM, J., had the executors invested in the securities designated by the will for the purpose, though against objection by the legatees, &c., and although they might have invested in other unobjectionable securities, they would not necessarily have rendered themselves liable for loss resulting therefrom.

It not appearing that the executors had derived any other personal benefit from the funds of the estate than that which might have arisen incidentally to their credit from moneys deposited in bank, and they having credited the estate with interest on all moneys used by them.—*Held*, they were not chargeable with compound interest.

Evidence being given that testator had agreed with M., one of his executors, to support him if he would attend to his (testator's) business, and of testator's saying he had promised M. to pay him sufficient for his own and family expenses, and of his expressing himself a short time before death, as satisfied with M.'s attention to the business.—*Held*, M.'s claim for compensation was properly allowed as a payment to him by the executors.

But the executors were not entitled to charge the estate with the expenses of their unsuccessful resistance to an application for an order requiring them to account, nor of their defense in proceedings for contempt for neglecting to account.

A note of one of the executors given testator in his lifetime, having been charged to him in their accounts.—*Held*, the charge was proper, notwithstanding judgment had been recovered on the note in Maine.

APPEALS from a decree of the surrogate of New York, made on the accounting of the executors of the will of Nathaniel Gilman, deceased.

Letters testamentary were issued on the 24th May, 1861, the account was filed in October, 1864, was referred to an auditor, who, on the 30th January, 1867, made his report. The decree of the surrogate affirmed this report, with a few modifications.

The testator's will directed the executors to invest a certain sum for the benefit of his wife, receiving and paying to her, during life, the income, and after her decease, to pay the principal in different shares to his children, on their severally attaining the age of twenty-five years, and their respective portions of the income annually, till such events, with a provision for the vesting of the shares of deceased children in the

Gilman v. Gilman.

survivors. It contained various similar provisions for the payment, at different times, of certain principal sums to his children, viz.: On their attaining the ages of twenty-one or twenty-five years, and after some specific and general legacies, gave the rest, &c., being the great bulk of the estate, to his children; and at the age of twenty-one years, to the representatives of deceased children, *per stirpes*.

It appeared that in 1861, soon after the commencement of the war, the executors had invested funds of the estate in considerable amounts in government bonds, and that some of the parties interested were dissatisfied, and seemed to be much disturbed at those investments, professing to believe that the government securities would depreciate in value; that bonds and mortgages were to be had at low rates of interest, by paying brokerage to obtain them; and that about this time one of the executors, who was engaged in business, and could obtain a discount of six per cent for cash payments for his purchases, at the suggestion of his co-executor, applied the funds of the estate to payments for his goods, less the discount, and afterward, when the credit would have expired, repayed the estate in full. He also purchased his own notes (which were good) for the estate at a discount, and obtained a loan to himself upon the security of his own bond and mortgage.

Other facts will appear from the opinion.

Charles E. Whitehead, Douglas Campbell and W. B. Aitkin, for the several appellants.

Charles H. Glover, for W.W. Gilman and other respondents.

Fullerton & Knox and Ira Shafer, for the executors.

Present—INGRAHAM, BARNARD and BRADY, JJ.

By the Court—INGRAHAM, P. J. On the accounting before the surrogate, various objections were taken by different parties to the report of the auditor, and from the decisions of the surrogate thereon, appeals are taken.

Gilman v. Gilman.

I propose, in the examination of the case, to notice the various objections taken and made the subject of appeal, without separating them into different appeals.

1st. The principal ground of appeal in which two or more of the appellants agree, is to the refusal to charge the executors with interest on the moneys received by them, and kept on deposit in banks.

These moneys were received from the beginning of 1861, and large balances remained in their hands from that date, down to the time of the accounting. The report of the auditor was made in January, 1867.

The auditor reports the whole amount received by the executors up to 1st May, 1866, to have been the sum of \$296,304, and the amount paid out for debts and expenses, \$26,741 $\frac{4}{5}$, and for legacies, &c., \$18,500. This would leave a surplus received by them of \$251,062 $\frac{3}{5}$. Of this, they have had on hand, uninvested, large sums, varying from \$28,000 in 1861, to \$119,000 subsequently.

By the will, the executors were directed "to invest in stocks of the United States or of a State, or of a city, or in town securities, or bond and mortgage, whatever funds may, from time to time, be lying in their hands, awaiting the periods at which, according to the provisions of the will, such funds were to be disbursed to the children or grandchildren of the testator."

This provision of the will was utterly disregarded by the executors. Small sums only were so invested, while these large balances were retained in bank. Two bank accounts were kept, and moneys were transferred from one bank to the other, and sometimes transferred back again.

The excuse for not investing, given by the executors, is: 1. That some of the parties interested objected to investments in United States bonds in 1861; 2. The difficulty of investing in bond and mortgage, and 3. That they kept the moneys in such a condition that the same could, at any time, be paid over to the persons entitled thereto.

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None of the reasons justify the executors in disobeying the directions of the testator. If the United States securities were considered objectionable, and if it was difficult to loan on bond and mortgage, there were other securities of States or cities, which were not subject to the same objection, and it was their duty to invest these moneys until they were wanted for payment of the legatees. No authority was given to retain such moneys uninvested for the purpose of distribution, and the only discretion vested in them was as to the security in which the investment was to be made. Instead of following these directions they appear to have used the funds, from time to time, or part of them for the accommodation of one or more of their own number, either by buying the notes or discounting the notes of one of the executors, or paying cash for goods purchased by him in his business, to be repaid by him at the expiration of the ordinary credit, and in one instance loaning to said executor money on bond and mortgage. No such transactions are within the power, nor are they consistent with the duty of an executor, and if any loss had occurred therefrom, such loss would have been chargeable personally on the executors consenting to such use of the funds of the estate. Where the will directs the specific securities in which the moneys are to be invested, the rule which requires adult legatees to bring to the knowledge of the executors the securities in which they desire such investments to be made is inapplicable. Whatever doubt may have existed as to United States securities in 1861, was long ago removed, and furnished no reason for the neglect to invest in such securities after 1863. Instead of this, the funds were kept in different ways; some in the iron chest for months; some deposited to the credit of the executors, as such, and some deposited to their credit as private persons. There can be no doubt that, for such disobedience of the plain directions of the will, and for such appropriation of the moneys of the estate to private purposes, of one or more of the executors, they have made themselves liable to be charged interest on the moneys so retained by them uninvested, after

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the allowance of a reasonable time for the purpose of making such investment.

Where the investment is to be made in public securities which can at all times be obtained in the market, thirty days is a reasonable time to require such investment to be made.

In taking account of such interest, a reasonable number of rests only should be made in the accounts, not holding the executors to invest every sum as soon as received by them. Such reasonable time would be not longer than six months, and that time would give the executors everything they could reasonably ask for in making the investments. Upon this branch of the case the executors must be charged with interest on the sums held by them at the end of every six months from 1st May, 1861, not invested, after allowing thirty days for making such investment.' (*Scheiffelin v. Stewart*, 1 John. Ch. 620; *Garrett v. Carr*, 3 Leigh, 407; *Lansing v. Lansing*, 45 Barb., 190; *King v. Talbott*, 50 Barb., 453.)

The excuse for not investing, viz.: That some of the legatees objected to investing in the securities of the United States, has no force. The testator had a right to direct as to the investment of these funds, and having done so in his will, the executors were bound to follow his directions. If they had done so, they would have been protected even if a loss had occurred, or they could have invested in other securities, to which there was no objection.

Under any view of this question, it seems clear that the executors have been guilty of neglect and disobedience of the provisions of the will, and that they are chargeable with interest as before stated.

It is urged that the executors are chargeable with compound interest.

If it appeared that they had neglected to give credit for the interest on the moneys used by them, or either of them, there would be no doubt of the rule, and its application to the present case. Here they appear to have credited the estate with interest on all moneys so used, leaving the

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liability to be only for moneys left uninvested in the bank, and, so far as the evidence goes, not showing any benefit derived therefrom by the executors, unless it was from a credit which such deposits might incidentally give them in their individual business.

2d. The next ground of appeal is, that Edward McClellan should be charged with certain notes collected by him.

I do not think the evidence warrants any interference with the findings in this respect. The question was a matter of fact solely, depending, in some measure, on contradictory testimony, and the evidence sustains the decision.

3d. The objection to the allowance to Edward McClellan, for services rendered the testator, is also not well taken. There is evidence that the testator had agreed to support McClellan and his family, if he would attend to his business; and, that the testator said he had promised to pay McClellan enough to pay his expenses and those of his family; and, a short time before his death, that he expressed himself satisfied with McClellan's attention to his business. There is no reason for an interference with this allowance.

4th. An objection is made to the allowance to the counsel for executors of their charges for services. So far as they had been paid, they were properly before the surrogate on the accounting. By his decree he has disallowed so much of them as relates to the proceedings in Maine.

The only item which is objectionable, is that allowing the executors to charge the estate, with the expenses of their opposition to an order for accounting, and with the defense of the executors after they were in contempt for not obeying the order of the surrogate to account. This charge is made at \$150, and should be disallowed, and the executors charged with that amount.

5th. The item of \$956 received by the executors is stated in the inventory, and remains charged against them as part of the estate, and they are there charged with it. It would be unnecessary to repeat it until the final accounting takes place.

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6th. The remaining objection is to the charge against George F. Gilman, of his note for \$12,626.54, held by the testator at the time of his death.

It is objected by Charles B. Gilman that this note should not be charged against the executor here, because the note has been transferred in Maine to the widow, after having been sued to judgment in Maine, where the widow is now prosecuting it to collection.

The mere recovery of the judgment in Maine is no ground for omitting to charge the executor with the amount of his indebtedness. There is no sufficient proof of the transfer of the note or judgment to the widow, or any other person, to prevent such charge here. There may be a conflict between the courts here and in Maine. That must be disposed of in the decision of the actions pending between the parties. As the bulk of the estate and the place of administration is here, it is proper that the accounting should be here. Had the executor paid the money in Maine, it might have constituted a good objection to the charge here; but, as no such proof is given, I do not see any ground for reversing the decision on this point.

The decree of the surrogate must be modified in the mode before stated, and the case referred back to the surrogate, with instructions to charge interest on the balances kept by them without investment, making rests every six months, and allowing thereafter thirty days for such investment, at the rate of six per cent, also to disallow the charge for opposing the accounting, and charging the executors with the amount allowed therefor, \$150.

Ordered accordingly.

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**THEODORE SALTUS, Appellant, v. FRANCIS H. SALTUS and
FRANCIS S. SALTUS, an infant, Respondents.**

(GENERAL TERM, FIRST DISTRICT, APRIL, 1870.)

An executor who has paid the principal of a trust fund to a legatee entitled to an annual payment of its income only, though not allowed on his accounting to credit himself with the payment as a payment of principal, cannot, it seems, be required to pay over again interest upon such principal.

But on appeal from a surrogate's order, directing the investment, with interest, of money so paid, if the petition of appeal specify as the sole ground of appeal, error in a certain other recited portion of the order, the error will be disregarded, and the order, if otherwise proper, affirmed.

The surrogate, having made an order directing an executor to pay moneys in accordance with a decree entered upon his accounting, may, if he neglects to comply with the order, and although it does not appear that execution has been issued on the decree, arrest the executor by attachment. On return of the attachment, the executor may show cause against his commitment.

The remedy against a surrogate's *ex parte* order is, it seems, by motion to the surrogate, and not by appeal.

APPEAL from an order of the surrogate of New York city and county.

The will of Francis Saltus, deceased, dated February 3d, 1854, devised and bequeathed the rest, residue and remainder of his estate to his executors, in trust among other purposes, to pay over to the testator's son, Francis H. Saltus, the income of one-eighth part thereof annually during his life, and afterward to pay and deliver the principal to Francis S. Saltus, the testator's grandson.

Theodore Saltus, the appellant, one of the executors, paid to the said Francis S. the sum of \$7,000, being an eighth part of the testator's residuary estate; but on his accounting as executor before the surrogate the payment was disallowed, and the decree thereupon entered, bearing date November 14th, 1857, provided in that respect, as follows: "7th. That the principal sums appearing in said account to have been paid to Francis H. Saltus were improp-

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erly paid to him, such payments not being authorized by said will, and that the executor, Theodore Saltus, is primarily liable therefor."

This decree having been affirmed on appeal, and a remittitur filed, the surrogate on the 27th May, 1868, ordered the appellant to deposit the amount so disallowed with interest from November 14th, 1857, in the Union Trust Company, within three days after service of a copy of the order, or in default thereof that an execution issue upon the judgment docketed against him.

The appellant appealed also from the last order. It was affirmed by default, and on filing a remittitur the surrogate on the 25th January, 1869, ordered "* * * that said Theodore Saltus deposit said moneys in said Union Trust Company within three days from the date of the service of this order, or that an attachment issue."

The appellant then took this appeal from the part of the order of 25th of January, above recited, complaining in his petition of appeal, that said part of such order was erroneous "so far as it orders the issuing of an attachment, and that your petitioner is injured and aggrieved thereby." The appeal was heard upon the above recited orders, and on the proceedings on this and the preceding appeal.

A. J. Vanderpoel, for the appellant, cited *The matter of Latson* (1 Duer, 696), *Hosack v. Rogers* (11 Paige, 603), *Doran v. Dempsey* (1 Bradf., 490).

D. A. Hulett, for F. H. Saltus.

C. A. Price, guardian *ad litem*, for F. S. Saltus.

Present—INGRAHAM, CARDOZO and BARNARD, JJ.

By the Court—INGRAHAM, P. J. The order appealed from directed the executor to deposit in the Trust Company the sum of \$7,000, with interest from 14th November, 1857,

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upon the ground that the same had been improperly paid to Francis H. Saltus, and should have been invested pursuant to the directions of the will, or that an attachment issue. The original order disallowed the item of \$7,000 charged as paid to Francis H. Saltus, as not authorized to be paid to him, and directed that such moneys should be invested, and decided that the executor was primarily liable therefor.

That order was affirmed by this court and the Court of Appeals.

On filing the remittitur, the surrogate ordered the executor to deposit the amount, with interest, in the Trust company.

The will of the testator directed the executors to pay to Francis H. Saltus, the interest, rents, issues and profits of one-eighth part of the residuary estate during his natural life, and on his death directed the principal to go to his heirs.

I am at a loss to see upon what ground the surrogate ordered the interest to be paid by the executor, if it had been received by the party entitled to it under the will, Francis H. Saltus. He had received the principal improperly and the executor was held liable for it, but that did not make him liable, for thirteen years interest which had been received by the legatee under the will, to whom it was to be paid.

The difficulty about this point, as urged by the appellant's counsel, is that the petition of appeal does not state this as a ground of appeal.

The petition states that the order appealed from is erroneous, so far as it orders the issuing of an attachment, and the improper allowance of interest is not appealed from.

In regard to the power of the surrogate to order an attachment to issue, the tenth section of title 1, ch. 2, part 3 of Revised Statutes, vol. 3, p. 364, is full upon this subject.

That section authorizes the surrogate to enforce all lawful orders and decrees of his court by attachment against the persons of those who shall neglect or refuse to comply with such orders and decrees. (*Seaman v. Duryea*, 11 N. Y., 324.) For the purposes of this appeal we must consider this order as a lawful order of the surrogate, and there is no good rea-

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son why he should not have power to enforce obedience thereto.

The case of *Doran v. Dempsey* (1 Bradf., 490), holds that if the executor is unable to pay, he will not be imprisoned, unless the act complained of was fraudulent or the party willfully refuses to pay what he has the means of paying, because the creditor can have an execution. These questions do not arise on this appeal. When the appellant is arrested on the attachment he will have the opportunity of showing any reasons why he should not be committed. At present we have no knowledge of the merits, and there is nothing in the papers from which such knowledge can be obtained.

It is suggested that the order was *ex parte*. If so, the remedy is not by appeal, but by motion to the surrogate, and upon the question of payment of the interest, we think there is good ground for making such motion if the appellant has not, by delay, deprived himself of the right to do so.

The order appealed from must be affirmed.

Ordered affirmed.

HERVEY C. CALKINS, as Receiver of The North American Lloyd, Appellant, v. RICHARD ATKINSON, WILLIAM Y. AGARD, LEWIS BARNSLORF, impleaded with THE MANHATTAN OIL COMPANY and others, Respondents.

(GENERAL TERM, FIRST DISTRICT, APRIL, 1870.)

Equity will entertain an action brought by the receiver of an insolvent corporation against its stockholders and creditors, to enforce the liability of the stockholders, as such, to the creditors, and to restrain the creditors from prosecuting the stockholders upon such liability.

So held, upon the authority of *Storey v. Furman* (25 N. Y., 214).

It seems, a receiver's action to recover from stockholders their unpaid subscriptions to the stock of an insolvent corporation, must be brought against each stockholder separately.

APPEAL from an order at Special Term, dissolving a preliminary injunction restraining the defendant, The Man-

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hattan Oil Company, as creditor of a corporation known as "The North American Lloyd," from commencing, continuing or proceeding in any action or proceeding against any of the stockholders of the corporation, to charge them as individually responsible for the debts of the corporation.

The stockholders of corporations, incorporated pursuant to "An act for the incorporation of companies formed to navigate the ocean by steamships" (Laws 1852, page 302), are jointly and severally liable for all debts due to laborers for services rendered the corporations, and also to the extent of the stock held by them, severally liable to creditors, for all the corporation debts and contracts, until the capital stock shall be paid in, and a certificate thereof filed.

The injunction was obtained upon a complaint in an action against the stockholders and creditors of "The North American Lloyd" setting forth, its incorporation under the above mentioned act and the acts amendatory thereof; its assumption of corporate powers, and transaction of appropriate business as a corporation; the appointment of the plaintiff as receiver of its stock, property, things in action, funds and effects, on the 4th January, 1867, in proceedings in an action in the Supreme Court, brought by one Watjen and others, against the corporation; the recovery of judgment on the 4th of March, 1867, by the plaintiffs in said action, dissolving the corporation, and continuing the plaintiff's receivership with the usual powers of a receiver; the due qualification of the plaintiff as such receiver, and his entry upon the discharge of the duties of the office;

That no certificate of payment of the capital stock of the company had been filed at any time, as required by the act above mentioned, and that the capital had not been paid in; that the indebtedness of the company exceeded \$850,000, which its assets were insufficient to pay; that the creditors of the company were very numerous, and that many actions had been brought against it, and judgments for large amounts recovered in some of them; that in many instances the actions had been commenced and judgments rendered after the said

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appointment of the plaintiff as receiver; that many of the actions had been allowed to go undefended, and judgments had been recovered against the company, where no valid or just claim existed, and in some instances, for amounts greater than the debts justly due;

That many of the creditors were also stockholders, who, to relieve themselves from liability, had purchased claims against the company, and had made collusive payments of other claims, and thus claimed to have exonerated themselves from liability, and entitled themselves to recover such claims from their co-stockholders;

That some of the stockholders had been sued by different creditors, each claiming to be entitled to recover to the extent of his claims;

That the actual indebtedness of the company could not be ascertained without an investigation of the accounts between the company and creditors; that the liability of the stockholders could not be settled without an accounting in an action in which all creditors and stockholders and the corporation should be parties; that in addition to actions already pending, numerous other actions were threatened by creditors against stockholders.

That an injunction was necessary, to prevent useless litigation, and to secure the stockholders from unnecessary annoyance, to prevent some creditors from obtaining an unfair advantage over others, and to place all the creditors and all the stockholders on an equal footing.

The complaint prayed that an account might be had, of all debts and moneys owing by the corporation, and to whom, and also of all the stockholders; that it might be ascertained and determined whether the stockholders were liable to pay the said debts or any part thereof, and if so, what stockholders were so liable, for what amounts, and in what proportions; and that the liability of the stockholders so ascertained might be enforced, and they adjudged to pay such amounts respectively to the plaintiff, and for an injunction, &c.

The injunction was dissolved on the application of the

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defendant, The Manhattan Oil Company, upon an affidavit showing that the said defendant was a judgment creditor of the "North American Lloyd," upon a judgment recovered on certain promissory notes of the company, received before maturity, and in the course of business, by said defendant, upon which execution had been issued, and returned unsatisfied against the company, that the said defendant had commenced an action against one of the defendants, a stockholder, and was proceeding therein to recover, &c., when enjoined.

John E. Burrill, for the appellant.

H. Odell, for the respondent.

Present—INGRAHAM, BARNARD and BRADY, JJ.

INGRAHAM, P. J. The plaintiff, as receiver of the North American Lloyd, seeks to recover from the defendants, as stockholders of the company, the amounts they are respectively liable for as stockholders, and for this purpose has made the creditors and stockholders parties, and obtained an injunction restraining the creditors from prosecuting the stockholders, and restraining the stockholders from paying any debts of the corporation.

Subsequently, on motion, the injunction was dissolved as to the Manhattan Oil Company, and from that order the plaintiff appeals.

I have much hesitation as to maintaining this action so far as the rights of the creditors are involved. It may be that some of the stockholders have not paid up the full amount of the capital stock subscribed for by them, and, if so, the company could have brought actions against them for the balance due by them. In such cases, the right to collect such sums would pass to the receiver, and he could maintain actions therefor. But such actions must be separate, and no action

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could be maintained against all of the stockholders jointly. (*Rankin v. Elliott*, 16 N. Y. 377.)

The statutory liability given by the seventh section of the act under which the corporation was formed, makes the stockholders responsible to the creditors in a sum equal to the amount of stock held by them respectively. For this liability no one but the creditor had the right to sue. The company never could enforce the payment, and, under ordinary circumstances, the receiver would only acquire the rights of the corporation.

Under the act of 1852, p. 67, a receiver appointed on the sequestration of the property of a corporation to collect a judgment, is vested with the powers of a receiver in the voluntary dissolution of a corporation. How the receiver in the present case was appointed does not appear. The complaint says he was appointed in an action then pending, upon his executing a bond, and that afterward a judgment was rendered dissolving the corporation, and continuing the plaintiff as receiver.

I should be disposed to hold that there was no authority for this action in the name of the receiver, to the exclusion of creditors, were it not for the views expressed in the case of *Story v. Furman* (25 N. Y., 214), as to the powers of receivers in the case of insolvent corporations.

SMITH, J., says: I cannot see why the order appointing the plaintiff receiver did not vest him with ample authority to enforce the stockholder's liability under the statute. Such liability is clearly a fund in equity for the payment of the debts of the corporation. * * * The appointment of a receiver was the only appropriate mode to reach and collect this equitable fund (the personal statute liability of the stockholders) for distribution among the creditors.

The General Term of this district lately held that one stockholder who had been sued for a debt due by the corporation, could maintain an action in equity against the other stockholders, to compel contribution, *Aspinwall v. Torrance & al.*, (1 Lansing, 381); and if the case of *Story v. Furman*

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& *al.*, above cited, is to be considered as applicable to this case, there is no good reason why the action should not be maintained against all the stockholders for that purpose.

The maintaining of such an action against all the stockholders for the benefit of all the creditors equally, renders it proper to restrain the creditors from separate suits for the recovery of their individual claims. There could be no equal distribution of this fund among the creditors, if individual creditors are allowed to obtain judgments against some of the stockholders in advance of the residue.

The order appealed from must be reversed.

Order reversed.

EDWARD A. KINGSLAND, FRANK CALLAHAN and ALEXANDER W. McLEAN, Respondents, v. PETER D. BRAISTED, WILLIAM C. GOVER, JOHN D. MORIARTY and JAMES E. BOYLE, Appellants.

(GENERAL TERM, FIRST DISTRICT, APRIL, 1870.)

The act of 1849 (page 889, chapter 258), providing for the prosecution of actions by or against "any joint stock company or association, consisting of seven or more shareholders or associates," in the name of its president, &c., did not, it seems, until extended by the act of 1851 (page 838, chapter 455), apply to associations wherein the members were not shareholders or stockholders.

The members liable, as such, of any "association composed of not less than seven persons, who are owners of, or have an interest in any property, right of action or demand, jointly or in common, or who may be liable to any action on account of such ownership or interest," are now, under the provisions of the act of 1849, liable in a suit upon an indebtedness of such association, after judgment against it, and execution returned unsatisfied thereon.

The statute preserved, but did not extend the right to enforce against such members a liability, as partners, which existed independently of it.

When the defense in such an action is a non-joinder of all the associates as defendants, the parties omitted must be pointed out by name, or judgment will go against the defendants named.

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Nor when the action is brought by a firm, several of the partners being also members of the association, but not joined as defendants, and the defense of non-joinder is not properly pleaded, is an objection available to the defendants, that one member of the association may not sue another.

And upon the authority of *Cole v. Reynolds* (18 N. Y. Rep., 74), the joinder of law and equity jurisdiction, under the Code, would render the objection unavailing as a defense. Per INGRAHAM, J.

In an action against the associates, after judgment and execution, returned *nulla bona* against the association (see Laws 1853, page 283), the plaintiff is not entitled to recover costs of the original suit.

ACTION by the members of a firm of E. A. Kingsland & Co., against the defendants, as members of "The Kavanagh Association," to recover upon an indebtedness of the association for goods sold, after judgment recovered, and execution returned *nulla bona*, in a suit against the association in the name of its president. The plaintiffs had judgment for the indebtedness, with interest, and costs in the suit against the association, which was incorporated, and the defendants appealed. The facts are stated in the opinion of the court.

L. S. Chatfield, for the appellants.

T. Sadler, for the respondents.

Present—INGRAHAM, SUTHERLAND and CARDOZO, JJ.

INGRAHAM, P. J. This action is brought against the defendants, as members of a joint stock association, to recover an account for goods sold to the association. An action had been brought against William C. Gover, as president, and a recovery had for the claim.

The complaint sets out the recovery of the judgment against the president of the association, and that an execution had been returned unsatisfied; that the defendants were members of the association, and that the association were indebted to the plaintiffs for the goods so sold.

The answer admits that defendants were members; that

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the association were indebted to the plaintiffs, and that the judgment had been recovered against the president of the association; that the goods were sold to the association, as such, and that all the members are jointly liable therefor. It also alleges that there are 150 members, all of whom are living, but does not give the names of the associates.

The parties agreed upon the facts by a stipulation admitting the judgment and execution returned unsatisfied; that the association consisted of over 100 members, and were indebted for the goods claimed for in the complaint; that the names of the members were unknown to them; that the goods were sold and delivered to the association, and the debt contracted by them as an association. The plaintiffs admitted that they knew, at the time of bringing the action, that there were other members than those sued.

The justice rendered judgment for the plaintiffs for the amount of the judgment and interest, and the defendants excepted. The case seems to have been tried on the supposition that all the members should be joined as defendants.

This association can hardly be said to come within the provisions of the act of 1849 (p. 389, Session Laws.) That act only applies to associations having shareholders. Throughout the act the same is called a joint stock company or association, and seems to contemplate only an association in which the members hold shares or stock; but the act of 1851 (page 838, Session Laws), extends the provisions of the act of 1849 to any company or association composed of not less than seven persons who have any interest in any property, right of action or demand, jointly or in common, or who may be liable to any action for or on account of such ownership or interest. The admission in this case brings the association within these provisions, and makes the parties liable under the provisions of the first statute. By that act, section 4, it was provided that the bringing an action against the president shall not deprive the plaintiff of the right, after judgment, of suing all or any of the shareholders or associates individually, as now provided by law.

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Without these acts the members would have been liable as partners for goods so purchased. The statute does not extend but only preserves the right to enforce a liability as it existed, independent of the statute. Considering the members as partners, the liability was a joint one and all the defendants should be joined; but where an action is brought against partners and some are omitted, those who are sued can only take advantage of such omission by pleading it. It is not enough to set up, as is done in this answer, that there are others who are liable, but the names must be given, so as, in the language of the old cases, to give the plaintiff a better writ.

There is no such answer in this case, and I see no reason why the court should not have rendered judgment against those who were named as defendants.

It is objected to this judgment that two of the plaintiffs were members of the association, and that one member cannot sue another. Admitting that to be the rule of law applicable to such cases, still it does not apply here.

This action is by a firm, some of the members of which are not members of the association. The firm, as such, is not thereby prevented from collecting a debt due them from the association, unless the non-joinder of such defendants is properly pleaded.

This question was discussed and decided in *Cole v. Reynolds* (18 N. Y. Rep., 74), in which it was held there is no difficulty growing out of the fact that one of the parties is a member of both firms (plaintiffs and defendants) in sustaining this action, and the reason given for it is that the distinction between actions at law and suits in equity is abolished, and as the parties are all before the court, the objection is now unavailing.

I think, however, the court erred in giving judgment for the costs against the defendants in the first action. The defendants are not liable for that portion of the judgment against the president of the association. The creditor had a right to sue in either form. If he sued the president, the

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statute says it shall not prevent an action against the members. That action, however, can only be for the original debt and interest, and the recovery in this case should have been for nothing more than the original debt and interest. (*Bailey v. Banker*, 3 Hill, 188.)

Judgment reversed and new trial ordered; costs to abide event.

In the Matter of FRANCES M. WINNE, an infant.

(GENERAL TERM, EIGHTH DISTRICT, FEBRUARY, 1870.)

The estate of tenancy by the curtesy, survives to the husband on the decease of his wife, in all her real property, to which it would have attached at common law, and over which she has not exercised the power of disposition given by the married women's act of 1848 and 1849. So held, reversing the decision at Special Term in this case.

APPEAL from the Niagara Special Term. The land in question descended to the petitioner from her mother, and the application was for a sale. The petitioner's father was still living. All the facts requisite, by the common law, to create an estate by the curtesy in the father existed in the case; and he claimed such estate. He was willing to unite in the sale, and take a portion of its proceeds in payment for his interest.

S. Parsons read the report of the referee as to the facts, and the decision of the Special Term, and submitted the question of title to this court.

Present—MARVIN, BARKER and DANIELS, JJ.

By the Court—MARVIN, P. J. I have read the opinion of Brother LAMONT in this case, and the opinion of Justice PORTER, in *Billings v. Baker* (28 Barb., 343). These opinions are able and exhaustive; but I am not quite satisfied by

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them that the wrong conclusion was reached in *Clark v. Clark* (24 Barb., 581), in which I followed *Hurd v. Cass* (9 Barb., 366). We are all agreed that the statutes of 1848-9, for the more effectual protection of married women, effected a great change in the law. How great and extensive is the question.

With a view to a proper understanding of the statutes, and the change effected by them, it is important that we know what the law was prior to their enactment. It is claimed that these statutes have annihilated that interest in property known as an estate by curtesy. The facts constituting this estate are, that the husband survives the wife; that she was seized of an estate in fee simple, or fee tail, of lands or tenements during the coverture; that she has had issue by the husband, born alive, and capable of inheriting the wife's estate as her heir. When these facts exist, the husband, on the decease of his wife, will hold the estate during his life as tenant by the curtesy. Such was the law prior to the statutes referred to. The writers, upon the common law, agree that four things were necessary to constitute this estate; marriage, seizin by the wife, issue, and the death of the wife; and they agree that the birth of issue makes the husband's title by curtesy *initiate*; and the death of the wife *consummates* the estate. Coke says: "The fourth and last requisite to make a complete tenant by the curtesy is the death of the wife, which consummates the estate already commenced, and renders it indefeasible." (Co. Litt., 30; Crabb's L. of Real Prop., § 1092.) Justice LAMONT seems to be of the opinion that the title by curtesy *initiate* is the same as when *consume*-*mate*. That there is really no difference; and the conclusion to which he comes is founded mainly upon this theory. I think this position is unsound. He cites some authorities to show that when the title is *initiate*, the husband may dispose of the estate, and that it may be taken by his creditors, and held during his life.

Admitting that the husband may make a valid grant of the estate *initiate*, and that the grantee may hold during the life of the husband, it does not follow, I think, that initiation of

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the estate is equal to a consummated estate. It may well be that the grantee would take an estate during the life of the husband, there being no limitation in the grant.

The grantee would take all the estate the grantor had, and it should be kept in mind that the grantor had an estate for the joint lives of himself and wife. This would pass by the grant, and whatever other interest he had. If there had been living issue of the marriage, capable of inheriting from the mother, then two of the four things necessary for the creation of the estate would have happened, viz.: Marriage, and the birth of issue; and if the wife was seized, then there would remain only the death of the wife to create the estate. There can be no such thing as a tenant by the curtesy, until the death of the wife. Coke says, "Albeit the estate is not consummate until the death of the wife, yet the state hath such a beginning after issue had, in the life of the wife, as is respected in law for divers purposes." (Co. Litt. 30, *a.*) And he proceeds to state what those purposes are, or rather what the husband may do. He shall do homage alone; and he becomes tenant to the lord; and if he makes a feoffment in fee, and the wife dies, the feoffee shall hold it during the life of the husband; and the heir of the wife shall not, during his life, recover it, for it could not be a forfeiture, for that the estate at the time of the feoffment, was an estate of tenancy by the curtesy initiate, and not consummate. The heir of the wife would not complain of the feoffment, for upon the death of the wife the estate by curtesy became consummate — complete. The heir could only interpose when the tenant did some act by which the estate was forfeited. (See Crabb's L. of Real Prop., § 1,091.)

"Curtesy is considered in many respects as a continuance of the wife's estate, and the husband takes it after her death, with all the incumbrances which would affect it in her possession if she were living." (Crabb's L. of Real Prop., §§ 1110–1075; Roper on Husband and Wife, 35.) I agree with Brother LAMONT, that the husband does not take by descent from his wife. His estate is simply that which

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the common law made it. I do, however, insist that there could be no such thing as a tenant by the curtesy, or an estate by the curtesy, until the death of the wife. That the husband, upon the birth of issue had some rights, and that some feudal duties were imposed upon him, is true.

These feudal duties do not exist at this time with us, and I do not understand that, in this state, the rights of the husband, as to his control over, and enjoyment of, the real estate of his wife is, by common law, any greater after issue of the marriage, than before, for the time of the joint lives of himself and wife. Upon the marriage he becomes seized of the freehold *jure uxoris*, and takes the rents and profits during their joint lives. (2 Kent Com. 130.)

The estate is a freehold in the husband to continue during the joint lives of himself and wife, and it may continue longer than the life of his wife, if he survives her. This depends upon the happening of the events requisite to constitute him tenant by the curtesy. The birth of issue is not enough to create this estate. It is properly enough called *initiate* upon the birth of issue, as an event has happened, which, with another event, may create a new or other estate than that which would be terminated by the death of the wife, viz, the estate by curtesy to continue during his life, after the death of his wife, the other event necessary to creation of the estate by curtesy. So long as the wife lives the husband is not tenant by curtesy, and he may never be. If he first dies there has been no such thing as tenancy by the curtesy. He has had a freehold estate during his life *jure uxoris*.

I have examined the cases cited by Justice LAMONT, and upon which he places much stress, and from which he argues that there is really no difference between the tenancy *initiate* and *consummate*. It is not necessary to note the cases here. They are, as he claims, to the effect that the estate of the husband may be sold on execution, and if it has become a tenancy by the courtesy *initiate*, the purchaser will hold the estate during the life of the husband though he survives his wife, as against the heirs of the wife.

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Since the statutes of 1848 and 1849, to be noticed hereafter, the husband has no interests in the lands of his living wife, and there can be no sale of the lands by virtue of an execution against the husband, hence, it is supposed, that the tenancy by courtesy is abrogated.

At the time these sales were permitted, the husband had a freehold *jure uxoris*, now by the statute abolished, and he may have been tenant by the courtesy *initiate*, and it is to be kept in mind that all *legal* interests in land could be sold by virtue of the judgment and execution. Whatever *legal* title or estate the husband had was bound by the judgment. His freehold estate *jure uxoris* could be sold and the sale would include whatever other or additional legal interest he had in the land. In short he was deprived by the sale of all the legal interest he had in the land. If he was tenant by the curtesy *initiate* and should survive his wife so that the tenancy would become *consummate*, this estate, for the life of the husband, would be vested in the purchaser upon the execution sale. The sale, by virtue of the judgment and execution would give to the purchaser the same title which the husband could, by grant, give to his grantee. The heirs of the wife would have no right to complain. If the land had not been sold or granted, the surviving husband would have held it during his life, and the purchaser at the sale on execution, or the grantee of the husband, could hold it no longer. The statutes of 1848 and 1849, have taken away this right of the creditor of the husband, and all control by the husband, over the property of his wife during her life; and this brings us to the question, has the husband any right in or to the real estate of his wife, after her death, she having died seized and intestate? The title of the act of 1848 (Session Laws, p. 307, ch. 200), is "An act for the more effectual protection of the property of married women," and, by section one, it is declared that "the real and personal property of any female who may hereafter marry, and which she shall own at the time of marriage, and the rents, issues and profits thereof, shall not be subject to the disposal of her husband, nor be

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liable for his debts, and shall continue her sole and separate property, as if she were a single female."

The third section authorizes any married female to receive by grant, devise or bequest, from any person other than her husband, and hold to her sole and separate use, as if she were a single female, real and personal property, and the rents, issues and profits thereof, and the same shall not be subject to the disposal of her husband, nor be liable for his debts. By the act of 1849, ch. 375, the third section is so amended as to include a taking by inheritance, and confers the right "to convey and devise her real and personal property, and any interest or estate therein, and the rents, issues and profits thereof, in the same manner, and with the like effect as if she were unmarried, and the same shall not be subject to the disposal of her husband, nor liable for his debts." Here we have the statutes changing the common law. The language of the statutes is unambiguous, and its construction is not difficult. The statutes give to the *married* woman the sole and exclusive use of her property; she may do with it as she pleases. She may grant or devise her real estate. Her husband, *as* husband, has no rights in her property during the time she is his wife—a "married female." And if it is absolutely necessary that the estate known as tenancy by the curtesy, must have a commencement—be vested—during the life of the wife, and that the legislature could not abolish those elements or qualities of this estate, which by the common law must have existed before the death of the wife, without destroying the estate in toto, then I concede that the husband cannot be tenant by the curtesy after the death of his wife. I think it will not be denied that the legislature possessed the power to deprive the husband of all rights, *jure uxoris*, and as tenant by curtesy *initiate*, and still preserve the right of the husband to the tenancy by curtesy consummate. As the wife has the power to alienate and devise her real estate, it is agreed that this proves that the legislature intended to abolish entirely any right in the husband to enjoy the estate after her death, though she should not have

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conveyed or devised it. The intention of the legislature is often a question for argument, arising out of the language employed in the act, but when the language is clear and undoubted, there is no room for construction. The act, as a law, is simply what its language makes it. If it is an act which changes the law, the question then is what change has the act made, and having determined this, the question is solved; the law, so far as it is unchanged, remains in force. If the new law is inconsistent with the prior law, then the latter is abrogated. It is a rule, very important in practice, that it is not to be presumed that the legislature intended to make any innovation upon the common law that the case did not require. The repealing of laws by implication is not favored. The language of the acts in question is confined to "married women." The title of the act relates to the protection of the property of "married women." The provisions of the statutes relate to the rights and acts of the "married woman" during the *marriage*. The husband is deprived of any right in, or control over, the property of the *married woman*, or female. The statutes are entirely silent touching the real estate upon the death of the married woman or female intestate; and the question of tenancy by the curtesy arises between the man who *was* husband, and the heir of the deceased wife. By the common law the estate of the wife was *continued* in the surviving husband. He did not inherit it or take it by descent, but under a certain state of facts, the wife's estate was continued in the husband, during his life, to the exclusion of the heir of the wife. The estate was peculiar. It was such as the common law made it. I will agree that the statutes we are considering are *remedial*, but how does this aid us? Is there anything in them showing by implication or otherwise, that the legislature preferred that the heir should come, at once, into possession of the estate, instead of the surviving husband? How can we say that the whole policy of the legislature was not accomplished by giving the married woman exclusive control over the property, with the right to convey or devise it? The power is given to her to

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deprive her husband of any interest in her estate after her death. She can devise it to her heirs.

I will agree with Justice POTTER, *Billings v. Baker* (28 Barb. 374), that for the purpose of ascertaining the *intention* of the legislature in these statutes, the language employed should be construed in the same manner as similar language used in a devise, marriage settlement, or trust estate created for the same purpose; and that the manifest intention in both should be the criterion to determine.

This brings me to a re-examination of two or three cases referred to by MASON, Justice, in *Hurd v. Cass*, and very briefly noticed by me in *Clark v. Clark*, and Justice POTTER has referred more fully to the cases. I thought they were authority for Justice MASON's decision, which I followed. The first case in order of time, *Roberts v. Dixwell* (1 Atk. R., 607), Sir Thomas Sandys, by his will, directed his trustees to convey certain freehold lands to the use of his daughter, Priscilla, for and during the term of her natural life, so that she alone, or such persons as she should appoint, should take and receive the rents and profits thereof, and so that her husband was not to intermeddle therewith, and from and after her decease, in trust for the heirs of the body of the said Priscilla for ever. It is stated in the case that the principal question was whether this was a trust estate or executory or executed, for if executed Priscilla was then tenant in tail, and her husband entitled to be tenant by the curtesy.

Priscilla was dead, but the chancellor considered what kind of estate the trustees ought to have conveyed to her if she had been living; whether in tail or to her for life, and he came to the conclusion that the conveying of an estate tail would have defeated the intention of the testator. He says if the wife had been entitled to an estate tail, I do not see but the husband must have been tenant by the curtesy. He remarks upon the objection that there was no *seizin* in the husband and wife, and has no difficulty in answering it. He refers to Coke as saying that to make a tenancy by curtesy there ought to be a right in the husband inchoate in

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the life time of the wife, but that he does not say that he should be seized of the rents and profits. The lord chancellor then says: I think that if this had been an estate tail he would have been entitled to be tenant by the curtesy, notwithstanding this court, by their authority, might have prevented the husband from intermeddling with the rents and profits, during the life of the wife. The chancellor came to the conclusion that the wife could not take an estate tail, but an estate for life only.

The next case is *Hearle v. Greenbark* (3 Atk., 695). A father devised to trustees, upon trust, that they should apply the rents, issues and profits, to and for the sole and separate use of his then married daughter during her life, and at her disposal, and not to be subject to the debts, power or control of her husband; but that her receipt, notwithstanding her coverture, should be effectual for the same; and upon further trust, that they should permit and suffer his daughter, by any deed or writing executed, &c., to give, devise and bequeath all his said freehold estates, &c., to such person or persons as his daughter should think fit.

The daughter had issue by her husband. She executed the power given her by the will of her father while she was an infant; and upon her death the questions were, was her execution of the power valid, she being an infant; and if not valid, was her husband tenant by the curtesy? It was held by the lord chancellor that the execution of the power was not valid; and that the husband could not be considered as tenant by the curtesy; that, under the will of the father, the rents and profits were to be applied to the sole and separate use of the daughter; and the trustees, who had the fee in all the testator's real estate, were to permit and suffer her to dispose, &c.; that a husband may be tenant by the curtesy of a trust; but to make a tenant by the curtesy, the wife must have the inheritance; and there must likewise be a seizin in deed in the wife during coverture. It was true she had the inheritance, because it descended till the execution of the power; but then the father, whose estate it was, had

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made the daughter a *feme sole*, and had given the profits to her separate use; therefore, what seizin could the husband have during the coverture? He could neither come at the possession or the profits. Was there, then, any equitable seizin of the husband? None at all; and to admit there was, would be directly contrary to the father's intention; and, therefore, neither in law or equity was the husband tenant by the curtesy. These are the two cases which, it is said, in *Morgan v. Morgan* (5 Madd., 408), were irreconcilable; and Kent, in his commentaries (vol. 4, p. 31), says the opinions are conflicting and cannot be reconciled.

Brother POTTER (28 Barb., 371), considering the cases in reference to the intent of the testator, is unable to see any conflict in them. It is true, in both the cases the husband was not allowed to be tenant by the curtesy; but in the first case, it was upon the sole ground that the wife took an estate for life only, and, of course, there could be no tenant by the curtesy. But the lord chancellor, in his opinion, distinctly says that a devise to the wife, for her separate use, will not bar the husband of his tenancy by the curtesy, because there is a sort of seizin in the wife; that if it had been an estate tail, the husband would have been entitled to be tenant by the curtesy, notwithstanding the court might have prevented the husband from intermeddling with the rents and profits during the life of the wife. In the latter case (*Hearle v. Greenbark*) the chancellor excluded the husband on the sole ground that he had no seizin in law or equity, as the father made the daughter a *feme sole*, and gave the profits to her separate use; whereas, in *Roberts v. Dixwell*, the chancellor had said, that a devise to the wife for her separate use would not bar the husband of his tenancy by the curtesy, "because there is a sort of seizin in the wife;" and he cites Coke as saying, that to make a tenancy by the curtesy there ought to be a right in the husband inchoate, in the life of the wife; but the chancellor adds he (Coke) does not say that he should be seized of the rents and profits.

Now I admit, what the chancellor said in this case as to

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the husband's being tenant by the curtesy, when the devise is to the wife for her separate use, was *obiter*, as he had held that the estate of the wife was only for her life; but that the two opinions are in conflict is, to my mind, entirely clear; and KENT, with his usual accuracy, was entirely right when he said the *opinions* are conflicting and cannot be reconciled.

Let us now examine a later case. (*Morgan v. Morgan*, 5 Madd. R., 408; see Crabb's L. of Real Prop., § 1108.) The estate was, by marriage settlement, conveyed to trustees in fee, upon trust, for the separate use of the wife, with power for her to make an appointment; and she made no appointment. It was held the husband was entitled to curtesy; and it was laid down as a rule, that whenever the wife, during coverture, had an equitable estate of inheritance, and had issue by the husband capable of inheriting the estate, the husband would be entitled by curtesy, unless it appeared to be the express intention of the settler to exclude him from the privilege.

Justice POTTER attempts to reconcile, and perhaps does, these cases as being controlled by the ascertained intent of the testator or settler; and I shall make no objection to the controlling element of *intent* in all the cases, and in the statute. But the question constantly recurs, what was the *intent* of the legislature. We have no means of knowing the intent of the legislature, except from the language used in the statutes; comparing it with the language used in cases that have arisen and been decided, and keeping in mind certain rules of construction when a statute changes the previous law. It may be well to remark that in *Hearle v. Greenback* there is a long history connected with the marriage of the testator's infant daughter, and of the conduct of her husband, and of the separation, and the lord chancellor had no doubt of the intention of the father to exclude his son-in-law from tenancy by the curtesy; and we know that, for the purpose of ascertaining intention, we often construe the language used in the light of surrounding circumstances, when it will admit of different constructions, and this rule is often resorted to in

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construing wills. But to return to the point, *Morgan v. Morgan* is a clear authority for the position in the absence of facts requiring or justifying the finding of other intention, that the husband of a wife, seized in equity of an estate of inheritance to her sole and separate use, with full power to dispose of the same, she dying without disposing of it, and having had issue by her husband; is entitled to be tenant by the curtesy. It may be well to make an extract from the opinion of the court: "At law the husband cannot be excluded from the enjoyment of property given to or settled upon his wife; but in equity he may, and this not only partially, as by a direction to pay the rents and profits to the separate use of the wife during coverture, but wholly, by a direction that, upon the death of the wife, the inheritance shall descend to the heirs of the wife, and that the husband shall not be entitled to be tenant by the curtesy. Such a provision was actually made in the case of *Bennett v. Davis*, and was acted upon by this court. Here the husband is partially, not wholly, excluded from the enjoyment of his wife's property. This court would, according to the intention of the settlement, have restrained him from all interference with the rents and profits during the life of the wife; but there being no further exclusion expressed in the settlement, the court can have no authority to restrain him from the enjoyment of his general right as tenant by the curtesy in the equitable inheritance of his wife."

I do not understand that the statutes of 1848 and 1849 exclude the husband beyond the life of the wife, or that they require or will justify us in holding that the legislature *intended* to bar the husband of his curtesy where the wife dies intestate, and without having conveyed her estate. The statutes do not say so, and it is begging the whole question to say that the legislature *intended* the heirs of the wife should take the estate immediately upon her decease, instead of her husband during his life. Such construction is also a forgetting or disregarding of the rule that the common law is not changed by a statute any further than a fair construction of the statute

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requires, and that a change or repeal by implication is not favored. We have seen that when the wife has the sole and exclusive rents, profits and use of the estate, and the power of appointment, or disposal, and does not exercise such power, the husband, upon her death, takes it as tenant by the curtesy. He has, during her life, been entirely excluded. He was not tenant by the curtesy *initiate* so far as his creditors, or his power of alienation, or his feudal rights and obligations were concerned. As to the feudal rights and duties, as mentioned by Coke, they have never had any application in this state. In England, in equity, they are entirely disregarded, and it is not necessary that seizin in the wife, one of the four requisites, should actually exist. It is enough, if she is entitled to the rents and profits, and actually receives them, the legal estate being in trustees. Kent, in view of the cases says, it is now settled that the husband is tenant by the curtesy if the wife has an equitable estate of inheritance, notwithstanding the rents and profits are to be paid to her separate use during coverture; that the receipt of the rents and profits are a sufficient seizin in the wife. He adds, and if lands be devised to the wife, or conveyed to trustees for her separate and exclusive use, and with a clear and distinct expression that the husband was not to have any life estate or other interest, but the same was to be for his wife and her heirs; in that case the Court of Chancery will consider the husband a trustee for the wife and her heirs, and bar him of his curtesy; citing *Bennett v. Davis* (2 P. Wm., 316; 4 Kent's Com., 31.) The case of *Bennett v. Davis*, was, the father devised land, held in fee, to his daughter, then married, for her separate and peculiar use, exclusive of her husband, to hold the same to her and her heirs, *and that her husband should not be tenant by the curtesy, nor have the lands for his life, in case he survived his wife, but that they should upon his wife's death go to her heirs.* As in this case the estate in fee vested in the wife, the husband at law, would at once take a freehold during the joint lives of himself and

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wife, and as he was a bankrupt the assignee in bankruptcy would take his estate, the court, however, held that, as the testator had the power to devise the premises to trustees for the separate use of the wife, in compliance with the testator's declared intention, the court would supply the want of trustees, and make the husband a trustee, and as the assignee in bankruptcy could have no better right than the husband, it was decreed that he join with the husband in a conveyance to a trustee for the separate use of the wife.

This is the case to which I briefly referred in *Clark v. Clark* (24 Barb., 582), citing also Crabb on R. Prop. (§ 1,106), and remarking that if the legislature had intended to deprive the husband of his rights by the curtesy, when the wife had not conveyed or devised the estate, it should have so expressly declared in the act. Brother POTTER (28 Barb., 354), says: The authority, cited by me (referring to Crabb on real property without noticing the reference to *Bennett v. Davis*, is directly against the conclusion to which I arrived, viz.: that the legislature should have declared such intention in the act, &c. It was *Bennett v. Davis*, to which I referred, and the reference to Crabb was added as a statement of the case would also be there found. I said it appeared that it was the express intention of the *testator* (printed "section"), that the husband should not be tenant by the curtesy, and he was excluded. I certainly thought it quite pertinent to show by the decisions that when the husband was expressly excluded, he could not be tenant by the curtesy, and my argument was, that unless this clearly appeared, he was not excluded, and if the legislature intended to exclude him in the absence of any act of exclusion by the wife, it should have so expressly declared. I admit, of course, that if the acts do, by a proper construction, debar the husband of tenancy by the curtesy, then there was no necessity of an express declaration to that effect, but I maintain that no such construction should be given to the acts. I do not find such intention in the acts, and, in my opinion, when all the facts requisite at common law to produce this tenancy exist, and the wife dies *intestate*,

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not having conveyed the land, the husband will take it for his life to the exclusion of the heirs of the wife.

HARMON T. HARRIS, Appellant, v. DAVID H. FRINK and JONATHAN FRINK, Respondents.

(GENERAL TERM, EIGHTH DISTRICT, FEBRUARY, 1870.)

The plaintiff made with the defendants, then in possession, and assuming to contract as agents, a parol agreement for the purchase of land, and its occupancy until the agreement should be fulfilled, and entered under the agreement, and planted oats. He was then expelled from possession by the defendants, who in due season harvested the oats, after forcibly preventing him from harvesting them, and he brought this action to recover their possession.—*Held*, that the plaintiff was rightly nonsuited.

He did not occupy as tenant, and had no legal title as such to the oats, which had been planted by him.

And, it seems, he could not try his title to the land by an action to recover possession of the harvested crop.

ACTION in the nature of replevin for a crop of oats. The case, in brief, as stated by the plaintiff's counsel in the opening, was this:

The defendants had been in possession of the land on which the oats were raised, for many years, and, in February, 1868, they assumed, as the agents of one Charles W. Frink, to sell the farm by parol to the plaintiff. The counsel stated the terms of the agreement, the amount to be paid, and how and when; that the defendants were to procure a conveyance of the farm to the plaintiff; that plaintiff should go into immediate possession of the farm, except the dwelling-house, and retain and work the farm and hold it until the defendants were ready to carry out the agreement on their part. The plaintiff went into possession and put in fifteen acres of oats, and after that in May, the defendants came and expelled the plaintiff from the farm and repossessed themselves of it; when the oats were fit to harvest the plaintiff commenced harvesting them, and the defendants drove him off by force, took possession of the oats and harvested them. The plaintiff

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then brought this action; the defendants gave the bond required by statute and retained possession of the oats.

The court intimated that upon these facts the plaintiff could not maintain the action, and the counsel then restated the case, adding, however, no material additional fact, but claiming that the plaintiff became a tenant at will and was entitled to the oats as emblements.

The court nonsuited the plaintiff, and his counsel excepted.

Webster & Hunting, for the appellant.

S. Parsons, for the respondents.

Present—MARVIN, BAKER and DANIELS, JJ.

By the Court—MARVIN, P. J. The contract for the sale of the farm being by parol, was void by the statute. There was no contract for the letting of the farm, and the relation of landlord and tenant did not exist. This relation must be established by agreement, express or implied, and so is the statute (1 R. S., 748, § 26), authorizing a recovery by the landlord for use and occupation, cited by plaintiff's counsel. There are some *dicta* to the effect, that an entry upon premises under a parol contract to purchase, and an occupancy will establish the relation of landlord and tenant, and that a recovery for use and occupation can be had, and there are some cases in which the action has been maintained. It will, however, be found on examining the cases, that the occupancy has been continued after the parties had abandoned the contract to purchase, or there have been circumstances from which an inference could be fairly drawn that the parties had agreed that rent should be paid, that is, circumstances from which an agreement to pay rent could be fairly implied. In *Smith v. Stewart* (6 J. R., 46), the entry was under a parol contract to purchase, and the occupancy was some dozen years when the purchaser refused to fulfill the contract. The circumstances were not such as to justify an implication of

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an agreement to pay rent, and it was held that no action for use and occupation would lie. The court said he was liable in another way to be turned out as a trespasser, and made responsible in that character for the *mesne profits*. (See *Sylvester v. Balston*, 31 Barb., 286.)

In the present case there is no room or ground upon which to imply an agreement to pay for use and occupation. The defendants expelled the plaintiff from the farm soon after the oats were sown. This action raises a question of *legal right*. Unless the plaintiff had the legal right to the possession of the oats, he could not recover; and this right depends upon the fact whether he had a legal title, not an equitable interest. Indeed, in this case, there is another fatal objection. The plaintiff was ejected from the premises upon which the oats were growing, and he was kept out of possession. If he had had the legal title and had been disseized, he could not maintain this action. The title to the land cannot be tried in this way. The oats while growing were a part of the realty; the remedy of the party disseized is to recover the possession, and then the *mesne profits*. In this case, however, the plaintiff had no legal title. His remedy was in a court of equity for a specific performance; and, if he then succeeded, the court possesses ample power to compel an accounting for the *mesne profits*. The title to the oats was not in the plaintiff.

It is not necessary now to inquire whether the plaintiff may not recover the value of his services and expenses in putting in the crop. The nonsuit was right and the motion for a new trial must be denied.

Motion denied.

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HENRY SEVERANCE, Appellant, v. SYLVANUS B. GRIFFITH
et al., Respondents.

(GENERAL TERM, EIGHTH DISTRICT, FEBRUARY, 1870.)

The assignment, of a mortgage given without bond, or other extrinsic written evidence of the debt secured, and containing no express covenant to pay, transfers to the assignee all the mortgagee's claim under the mortgage, viz.: His remedy against the land.

A complaint for foreclosure, set forth such a mortgage, expressed as security for payment of a sum of money in installments, and averred that it had been given to secure a part of the price of the mortgaged premises, and assigned to plaintiff.—*Held*, on demurrer, to show plaintiff to be owner of the mortgage debt.

APPEAL from an order of Special Term sustaining a demurrer by some of the defendants to the complaint in an action to foreclose a mortgage. It was alleged in the complaint that the defendants, Griffith and Thomas Young, were indebted to Seward B. Clark in the sum of \$2,000, being for a part of the purchase price of lands, &c.; that for the purpose of securing the payment to Clark of the \$2,000 and interest, on or about March 19, 1863, they executed to Clark their mortgage, which contained the conditions, covenant and words and figures as follows, viz.: "This grant is intended as a security for the payment of the sum of \$2,000, to be paid as follows: \$500, with interest on the whole sum, to be paid in one year from the date of these presents." The times for the payment of other sums, and interest, were then stated. The recording of the mortgage was stated, and the description of the lands conveyed by the mortgage was set forth.

The usual power of sale in case of default was also alleged. It was then alleged that Seward B. Clark, on the 24th day of March, 1863, by an instrument in writing, sold, assigned and transferred the said mortgage to one Simmons, and on the 8th day of March, 1869, Simmons executed an assignment of the mortgage to Henry Severance, the plaintiff. The recording of the assignments was alleged; also, a failure

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to comply with the condition of the mortgage by omitting to pay, &c.; that no proceeding had been had at law, or otherwise for the recovery of the said sum secured by the said mortgage, or any part thereof, &c.

The ground of demurrer was that the complaint did not state facts sufficient to constitute a cause of action in this; that it did not appear by the complaint that the plaintiff was the owner or holder of the claim or indebtedness to secure which the said mortgage was given, or that any transfer of such claim or indebtedness was ever made to the plaintiff.

C. D. Murray, for the plaintiff, cited *Day v. Perkins* (2 Sand. Ch. R., 359).

M. A. Whitney, for the defendant demurring, cited *Green v. Hart* (1 John. R., 580); *Jackson v. Willard* (4 J. R., 43); *Jackson v. Blodget* (5 Cowen, 202); *Wilson v. Troup* (2 Cowen, 231); *Jackson v. Bronson* (19 J. R., 325).

Present—MARVIN, DANIELS and SMITH, JJ.

By the Court—MARVIN, P. J. The authorities cited by the counsel for the defendants, fully sustain the position that the assignment of a mortgage, leaving the debt evidenced by a written obligation to pay, to secure the payment of which the mortgage was given, unassigned, is a nullity. In other words, the debt being the principal and the mortgage the incident, they cannot be separated, and the *incident* preserved in the absence of the principal.

But have these cases any application to the present case? In this case there was no bond or other written obligation to pay the debt of \$2,000, to secure the payment of which the mortgage was given.

It is alleged in the complaint that Griffith and Young were indebted to Clark in the sum of \$2,000, being for a part of the purchase price of lands hereinafter described, referring to

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the description of the lands in the mortgage. We are not authorized, from this language, to infer any bond or other written obligation to pay the debt. The only written instrument securing the payment of the debt, or evidencing it, was the mortgage; and that does not contain any express covenant to pay. The times when and sums to be paid are specified. This is a case to which the statute applies. "No mortgage shall be construed as implying a covenant for the payment of the sum intended to be secured; and when there shall be no express covenant for such payment contained in the mortgage, and no bond or other separate instrument, to secure such payment, shall have been given, the remedies of the mortgagee shall be confined to the lands mentioned in the mortgage." (1 R. S., 738, § 139.)

Clark, the mortgagee, in transferring the mortgage, parted with all the claim he had against Griffith and Young. He had no remedy against them personally; the remedies he had were against the lands mortgaged, and these passed to his assignee. (See *Hone v. Fisher*, 2 Barb. ch. R., 560.) It does not appear that the attention of the Special Term was directed to the statute, nor was it referred to upon the argument at the General Term.

The complaint stated all the facts, and they, in my opinion, constitute a good cause of action in the plaintiff. The judgment or order of the Special Term must be reversed, and there must be judgment for the plaintiff upon the demurrer, with leave to the defendants to withdraw the demurrer and answer on payment of costs.

Order reversed.

Bagley v. Blackman.

EDWARD BAGLEY, Appellant, v. LEONARD J. BLACKMAN et al.,
Respondents.

(GENERAL TERM, EIGHTH DISTRICT, APRIL, 1870.)

Unless the testator declares, or gives the witnesses in some form to understand, at the time of making or acknowledging his subscription, that the instrument signed is his will, there is no sufficient publication.

Accordingly, where the witnesses had been sent for to witness the testator's will, and went for that purpose, but had no other information, that they were witnessing his will.—*Held*, that the publication was insufficient.

APPEAL from a decree of the Surrogate's Court of Erie county, admitting to probate the last will and testament of Libbius Bagley.

Corlett & Tabor, for the appellant.

Lewis & Gurney, for the respondents.

Present—MARVIN, BARKER and DANIELS, JJ

By the Court—MARVIN, P. J. The point made by the appellant is, that the testator did not, at the time he subscribed the instrument, declare the instrument so subscribed to be his last will and testament, as the statute requires (2 R. S., 63, § 40, sub. 3). Lewis J. Peckham, one of the subscribing witnesses, after stating that he went to the house of the deceased in company with the other subscribing witness, says the deceased was at that time sick and not able to be out of his house. He states who were in the room. He thinks Mr. Swartout went, at the request of the deceased, and brought the paper (the will) from a trunk in the room. Bagley asked Swartout where the pen and ink and that paper were. Thereupon he (Swartout) got it and laid the pen and ink and the paper on the table. The deceased then sat down and signed the paper. The deceased then asked witness if he would witness that paper. The witness then sat down and

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signed his name as a witness. The deceased then asked where Noyes was. Noyes had stepped out a moment. When he came in, the deceased said something to Noyes about signing it. Noyes stepped up and signed his name as a witness. The witness did not read or hear read the paper or any part of it. The deceased did not, in that interview, use the words "will" or "testament;" but when the witness signed it, the deceased did wish him to put his residence at the end of his name, and he did so. The witness did not know that it was necessary for a witness of a will to write the place of his residence. The witness thinks Swartout took the will and put it back into the trunk and locked it and gave the key to Libbius Bagley. When this witness was requested by a third person to go to the house of Bagley, he was told he was wanted to sign as witness to a will, which was the reason of his supposing it a will, &c. Noyes J. Atwood, the other witness, says the deceased spoke to him and asked him if he would finish that, pointing to the paper lying on the table. (the paper witness had seen the deceased sign). Witness asked the deceased if he wanted him to put his name down, and he said he did, and he signed his name as a witness. Witness thinks the deceased spoke to him about putting his residence down, and he wrote, *Lancaster*, his residence. This witness read no part of the will. The body of it was in the handwriting of his father, Henry Atwood.

The witness did not hear the words "will and testament" used on that occasion. He had been told before, that the deceased wanted him to come and sign a will. Beyond that fact he had no knowledge that the instrument was a will.

The requirements of the statute are clear and specific. "The testator, at the time of making such subscription, or at the time of acknowledging the same, shall declare the instrument so subscribed to be his last will and testament." In the present case there was no such declaration; there was no publication of the instrument as a will and testament. In *Brinkerhoof v. Remsen* (8 Paige, 488), Chancellor Walworth examined the law in relation to the execution and proof of

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wills, as it existed in England, under the English statute, and in this State, and the change effected by our Revised Statutes. In giving construction to the provisions of our statute requiring publication, he said that "no particular form of words is necessary, even under this statutory provision, to communicate the information from the testator to the attesting witnesses that he knows and understands the nature of the instrument he is executing, and that he intends distinctly to recognize it as his will." This rule is often referred to and applied in subsequent cases. In *Coffin v. Coffin* (23 N. Y. R., 15), one of the attesting witnesses "asked the testator if he wished him to sign or witness the paper as his will; to which the testator answered in the affirmative." Both of the witnesses were present at the time. It was held that this was a sufficient publication, and a compliance with the requirements of the statute. See also *Trustees of Auburn Seminary v. Calhoun* (25 N. Y., 442), where the publication of the will was established upon the testimony of one of the attesting witnesses, in opposition to the other.

In *Brinkerhoof v. Remsen, supra*, and in *Lewis v. Lewis* (1 Kern., 220), the probate of the will was refused, for the reason that the proof of execution and publication was not such as the statute requires. The order of the surrogate admitting the will to probate, must be reversed, and an order entered for the settlement of issues, to be tried by a jury. The question of costs is reserved to the final hearing or judgment.

Order reversed.

JOHN W. HILL, Executor, &c., of JACOB B. HILL, deceased,
Appellant, v. MARY HILL and others, Respondents.

(GENERAL TERM, EIGHTH DISTRICT, MAY, 1870.)

Testator gave his homestead farm, and all his personal estate, mainly household furniture, farming implements and stock on the farm, *durante viduitate*, and in lieu of dower, to his widow, for her maintenance, and as

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means in her hands, or under her control, for bringing up, educating, &c., his four minor children, who were to remain with the widow at her dwelling on the farm, and beyond the value of their services, at her expense, which she was to defray out of his estate or its income; the farm to remain unsold and undivided during the widow's estate, she, with the advice and assistance of the executors, to control and manage his estate for her own and the children's benefit, and for the purposes intended by the will, and, as fast as consistent therewith, to advance to the minors, at the age of twenty-one, such portions of the estate given them respectively as, with the executors, she might deem practicable and reasonable. There was a limitation over, after the widow's estate, to the testator's five children, who were then given the residuary real and personal estate.

The testator's children were all twenty-one at the time of his decease.

Held, that the executors were not entitled to convert the personal property into permanent securities, and pay the income thereof to the widow; but that it passed to her *in specie*, and in trust for the purposes specified in the will.

APPEAL from a decree of the Orleans county Surrogate's Court, on the final accounting of the executors of Jacob B. Hill.

Jacob B. Hill made and published his will in January, 1850. He died in May, 1867. The proceedings before the surrogate were upon the petition of Mary Hill, the widow of the testator, to compel the executors, &c., to render an account. The inventory of the property of the deceased was filed May 6, 1869; and the account of James E. Hill, one of the executors, was filed June 7, 1869; and of the other executor, John W. Hill, the same day; and the trial was had after this date, on several days. The decree of the surrogate was made August 23, 1869; one of the executors, John W. Hill, filed his petition of appeal October 13, 1869; and the respondents answered the petition of appeal in November. The principal question in the case arose under the will: Mrs. Hill, the widow, claimed, under the will, all the personal property of the testator, and the Surrogate's Court sustained the claim. The appellant, John W. Hill, insisted that such construction of the will was erroneous.

The testator first gave his homestead farm, about 145 acres, to his wife, Mary Hill; also all his goods, chattels and personal estate and property, to have and to hold, the farm

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and personal property subject to the provisions of the will, and for the uses and purposes mentioned and expressed, "for and during the term of her natural life," if she survived him, and so living remained his widow. After her decease, &c., he gave and devised all his real and personal estate to his five children, naming them, to have and to hold, &c., &c., forever, share and share alike. He declared that the gifts, &c., to his wife, were intended and designed for the maintenance and support of his wife, and as means therefor, and also as means in her hands, or under her power and control, for the bringing up, maintenance, support and education of his infant or minor children, John, Mary, James and Cynthia, and for carrying into effect the provisions, intent and purposes of the will.

He directed that his infant children should remain, and continue to abide with his wife, at her dwelling-house on the homestead farm, &c.; and that they should be under her control and management; and that they should serve and obey her as if she were their father and guardian. He directed how they should be brought up, and the costs and expenses, over and above the value of their labor and services, were required to be borne by his wife, and defrayed by her out of his estate, or the profits and income thereof. He directed that his homestead farm should remain unsold and undivided during the life of his wife, &c., and that she should, with the advice and assistance of his executors, control and manage his estate for her own benefit and that of his said children, and for the purposes intended and mentioned in the will, and that she, from time to time, and as fast as she reasonably might, consistently with the provisions of the will, should give and advance to his minor children, when they attained the age of twenty-one, &c., such part or parts of the shares, or portions of in or out of his estate, given to them respectively, as she and his executors should deem practicable and reasonable under the provisions of the will. Regard was to be had to any advancements made by him to any of his children, so that his

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children should share alike as nearly as practicable. The provisions for his wife were declared to be in lieu of dower, and all demands or claims by her.

The gifts and devises were to be taken, subject to the payment of his debts and the funeral expenses of himself and wife, and the costs and expenses of carrying into effect the will. He appointed his sons, John and James C., his executors. The four children, mentioned in the will as minors, were all of full age at the time the testator died. The particular exceptions taken to the decree of the surrogate are noticed in the opinion.

John H. White, for the appellant.

Reynolds & Crandell, for the respondents.

Present—MARVIN, BARKER and DANIELS, JJ.

By the Court—MARVIN, P. J. The surrogate declares that the true intent and meaning of the will is, that after paying the debts, &c., the residue of the personal estate should be and remain in the possession, custody and control of the widow, Mary Hill, for her own use, maintenance and enjoyment during her natural life, &c.; and the accounting of the executors was made upon this basis.

I think the surrogate has put the proper construction upon the will. The house, farm and the personal property are devised and bequeathed together. They were to be kept and used together for the maintenance and support of his widow, and as means therefor, and also as means in her hands, or under her power and control, for the bringing up, maintenance, support and education of the infant children, &c. These children are to be brought up on the farm. They are to labor, &c., and the costs and expenses of bringing them up, supporting and educating them, over and above the value of their labor and services, are directed to be borne by his wife and defrayed by her out of his estate or the profits and income thereof. By the whole scheme of the will the personal property

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was given to her, charged with certain trusts. Some of the duties imposed upon her did not arise and become operative, as the contingencies contemplated did not arise. The children, who were infants when the will was made, had attained full age before the decease of the testator, so that the provisions relating to maintenance and education became inoperative. But the purposes to which the testator devoted the property were not limited to these children. One of these purposes was the maintenance and support of the widow. The testator directs that his wife, during her life, shall, with the advice of his executors, control and manage the estate for her own benefit and that of his children, and for the purposes intended and mentioned in the will; and that she from time to time, and as fast as she reasonably can, consistently with the provisions of the will, give and advance to his children John and James, when they respectively attain the age of twenty-one, and to Mary and Cynthia, when, &c., such part or parts of the shares or portions of in or out of his estate above given them respectively, as she and his executors shall deem practicable and reasonable under the provisions of the will. As to the personal property, it was given to Mrs. Hill for life, for certain purposes specified. She holds it in trust, and the executors, as such, after paying the debts, &c., have no interest in or control over the residue. The management of this property is not involved in this accounting. If Mrs. Hill, the widow, is not managing or using the property, as was intended by the testator, proper remedies may be resorted to, for the protection of the property, for the benefit of those to whom it is given upon the termination of the estate of Mrs. Hill. The inventory of the property shows its value to be some \$2,000, and it consists mainly of household furniture and farming implements, and some stock on the farm. By the will she was to use and manage the farm and occupy the lands. I think it was the intention of the testator that his widow should possess and use the property, *in specie*. The general rule undoubtedly is that when there is a general bequest of a residue for life, with a remainder over, the pro-

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property must be sold and converted into money by the executor, and the proceeds must be invested in permanent securities, and the interest or income is only to be paid to the legatee for life. Chancellor Walworth so stated the general rule in *Covenhoven v. Shuler* (2 Paige, 132). He recognizes the rule in *Clark v. Clark* (8 Paige, 160); also, in *Spear v. Tinkham* (2 Barb., Ch. R., 214), where he cites *How v. Earl of Portsmouth* (7 V., 137); *Fearns v. Young* (9 id., 549). I have looked into these cases, and they are all unlike the present case. There was no difficulty, in them, in carrying out the general principle without doing violence to the intentions of the testator. In the present case, had the testator died soon after the making of his will, during the minority of some of his children, a sale of the personal property would have defeated the clearly expressed intentions and directions of the testator. To deprive the widow now of the personal property, mainly agricultural implements and household furniture, would defeat the intention of the testator. It was to her that the direction was given, with the advice and assistance of the executors, to give and advance to the children, as they should attain the age of twenty-one, such part or parts of the shares or portions of in or out of his estate given to them respectively, as she and his executors should deem practicable and reasonable under the provisions of the will. She is charged with this obligation. In short, I think there was no error in the decree in refusing to charge the executors with the residue of the personal property. It was to remain with the widow, or be delivered to her.

Several minor errors are alleged by the appellant in the accounting. I have examined them, and do not think that the objections taken by the appellant are well founded.

The decree of the Surrogate's Court should be affirmed, with costs, to be paid out of the estate.

Decree affirmed.

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JOHN SCOTT, Appellant, v. MARTIN WARNER, Respondent.

(GENERAL TERM, EIGHTH DISTRICT, APRIL, 1870.)

The plaintiff applied to the defendant to purchase a ton of hay; the defendant offered to sell him a quantity by measurement, giving him to understand that its dimensions would include a ton. The plaintiff took the quantity, and paid for a ton, but there was, in fact, much less than that in weight.

In an action for the excess in price.—*Held*, that in the absence of fraud, there was a mutual mistake in a material fact, and the plaintiff could recover.

A promise by the defendant to pay a certain sum in settlement of a dispute respecting the plaintiff's claim.—*Held*, to be supported by a good consideration.

APPEAL from a judgment of the Cattaraugus County Court, reversing the judgment of a justice.

The facts are stated in the opinion.

Wm. G. Laidlaw, for the plaintiff.

S. S. Spring, for the defendant.

Present—MARVIN, DANIELS and BARKER, JJ.

By the Court—MARVIN, P. J. Action to recover back money paid in excess on amount of hay sold by the defendant to the plaintiff.

The plaintiff, as a witness, stated that he bought some hay of the defendant; that the defendant asked eight dollars for a ton, and wanted to measure it instead of weighing it; the plaintiff said he did not know anything about measuring hay; the defendant said that seven feet square by five feet thick would make a ton, he knew it would. The plaintiff took the hay, and paid eight dollars. In April or May after, the plaintiff saw the defendant, and told him that he (the plaintiff) did not get one-half a ton. The defendant said he had

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not any more to spare. Plaintiff told him he must pay back part of the money, and the defendant said he would fix it up. The plaintiff told him if he would pay three dollars it would fix it up.

In a subsequent conversation, the plaintiff asked defendant when he was going to get the money for him, as he was hard up for money. The defendant said he did not know, as he was hard up for money. On cross-examination, the plaintiff stated that the defendant said he was selling by measure; did not weigh it; he said it would make a ton. The plaintiff gave evidence tending to prove that the quantity of hay he got was much less than a ton, and not more than half a ton. A witness also stated that he was present when the plaintiff asked the defendant if he had got any money for him; the defendant said he had not; the plaintiff said he had better be getting it.

The defendant was a witness in his own behalf, and stated that he told the plaintiff if he sold him any hay he should sell it off in a chunk; that he had so much to do he would not be bothered to weigh it; that plaintiff wanted to know how many feet it took for a ton, and defendant told him he did not know, only what folks told him; that some said 500 and some 400 feet; that he told the plaintiff that if he would take seven feet square and five thick he might have it for eight dollars; that the plaintiff thought it would not make a ton; that defendant told him he did not care, he was going to sell the rest that way, and if he wanted it he could have it that way; the plaintiff said he would take it.

That some time after, the plaintiff spoke to him about the hay, and he told the plaintiff that he supposed that was fixed long ago; the plaintiff said it was not fair; the defendant told him as long as the bargain was made, he ought not to back out; the plaintiff said he did not want any fuss about it; and defendant said he did not, and asked how much the plaintiff claimed back; he said three dollars; and defendant told him he should not agree to pay him a cent. The evidence showed that the defendant sold some hay to others by measure, seven feet square and five thick for a ton, and some

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to other persons, giving a larger measure, to one person eight by eight by eight—512 feet. The verdict was for the plaintiff; damages three dollars.

The County Court ought not to have reversed the judgment. The evidence was sufficient to justify the verdict, and the verdict was just. The negotiation was for a ton of hay, and the price was eight dollars. The defendant was not willing to be at the trouble of weighing it; he represented that seven feet square by five feet in depth would make a ton, and that he knew this fact. The evidence tended to show that such measurement would not make more than half a ton. The plaintiff had no knowledge as to the measurement necessary for a ton. The defendant assumed to know. If he did not know, then he misrepresented. If he had been so informed, and so believed, and his representations were founded upon such information and belief, and were not fraudulent, then he was greatly mistaken, and led the plaintiff into mistake. The parties were mutually mistaken as to a material fact. This is the most charitable view of the case. The mistake was serious. The evidence would justify the jury in finding that the defendant did not get more than half the quantity of hay he supposed he was to have, and which the defendant claimed he was selling to him. *Wheadan v. Olds* (20 W., 174), cited by plaintiff's counsel, is in point.

In that case, oats were sold at a certain price per bushel, and the quantity was estimated upon a mistaken state of facts, and the purchaser agreed to take the oats at the quantity estimated, at his own risk hit or miss; it was held that he could recover back, *pro tanto*, the money paid.

Again in this case there was, assuming that the parties acted honestly, and that there was no fraud on the part of the defendant, a dispute between the parties, which constituted a good consideration for a settlement. The plaintiff asserted a claim that he did not get half a ton of hay, and claimed that the defendant should pay back a portion of the money, and the defendant promised to fix it up; the plaintiff told him that three dollars would fix it up. The defendant made

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no objection to this. The cases cited by defendant's counsel are not in point. In those cases there was no dispute about the facts. In *Geer v. Archer* (2 Barb., 420), there was no dispute about the facts, and the giving of the note was voluntary and without consideration. The true rule is laid down in *Farmers' Bank, &c., v. Blair* (44 Barb., 641), that the controversy must be real and substantial, not a case where the claim is unfounded and palpably untenable. In view of the testimony of both of the parties, there was, in this case, a controversy real and substantial.

Again, the claim of the plaintiff was strongly equitable. He expected to get a ton of hay, and he paid the price of a ton. The evidence as to the conversation between the parties, and the precise terms of the contract, was conflicting; but it was for the jury to decide, and not the court, as to the facts.

The judgment of the court must be reversed, and that of the justice affirmed.

THE BANK OF ALBION, Respondent, v. OSCAR F. BURNS and
others, Appellants.

(GENERAL TERM, EIGHTH DISTRICT, MAY, 1869.)

B. was indebted to a bank, and executed to it his bond for an amount equal to part of the indebtedness, conditioned to pay at a time specified; he then joined with his wife in a mortgage of her separate real property, securing to the bank the payment of the sum named in the condition of the bond, according to the terms thereof, and delivered it, agreeing that it should remain a continuing security in the hands of the mortgagee for payment of all his liabilities then existing,—something more than double the amount secured,—and also, for all those he might afterward incur. The bank had no actual notice that B. was not owner of the mortgaged property, but the deed to B.'s wife was recorded. B. never paid his original indebtedness. He obtained extensions of the time of payment after the maturity of the liability secured by the mortgage, and became still more largely indebted to the bank, and so remained at the time of his decease. In an action by the bank to foreclose the mortgage.

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Held, that it was, originally, a valid collateral security for payment of the existing indebtedness covered by B.'s bond ;

That it was not a continuing guaranty for future advances to B., he having no presumptive authority from his wife, to make an agreement in that respect ;

That the plaintiff was charged with notice that the owner of the land, pledged it as surety for B.'s debt ;

That the land was discharged from the lien of the mortgage by the indulgence given to the principal debtor.

APPEAL by the defendants, Robert Burns, Eddie Burns and Anna Burns, impleaded, &c., from a judgment entered upon the report and decision of a referee. The action was to foreclose a mortgage.

Oscar F. Burns and Anna Burns intermarried October 1st, 1850. August 8th, 1861, Oscar executed to Roswell S. Burrows, president of the Bank of Albion, a bond conditioned to pay \$2,000, one half in three months, and one half in six months, interest on all sums unpaid, payable at the time of each payment. A mortgage, bearing the same date, was executed by Oscar and his wife Anna, covering the land in question, conditioned for the payment of \$2,000, according to the condition of the bond. This mortgage was acknowledged August 9, 1861, and recorded the same day. Mrs. Burns was seized in fee of the land mortgaged. The referee, however, found that Burrows was not advised, and had no knowledge or information that the premises were the separate property of Mrs. Burns.

Mrs. Burns took title to the premises under a conveyance to her, dated October 5, 1860, acknowledged the same day, and duly recorded October 6, 1860.

The referee found that the bond and mortgage were executed and delivered to the plaintiff, as collateral security for the payment of any and all claims and demands which the bank then had, and thereafter might have, against Oscar F. Burns by note, draft, check or otherwise, and for all liabilities on which Burns then was, or might become, liable. The fact so found was denied by the appellants, and they complained of the finding.

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Anna Burns died in March, 1862, and the infant appellants are her heirs at law. Oscar F. Burns died in July, 1866.

The referee found that at the time the bond and mortgage were executed, Burns was indebted to the plaintiff in the sum of \$4,178.14, and that but little, if any, portion of this indebtedness was ever paid; but that it was extended from time to time, new notes being given therefor; and that the indebtedness gradually increased by accumulation of interest and new loans; and that at the time of Burns' death, he owed the plaintiff over \$14,000. The referee directed the usual judgment of foreclosure in favor of the plaintiff, and the defendants excepted.

Goff & White, and J. L. Talcott, for the respondents.

Church & Sawyer, for the appellants.

Present—MARVIN, LAMONT and BARKER, JJ.

By the Court—MARVIN, P. J. The evidence to sustain the finding that the bond and mortgage were executed as collateral security and a continuing guaranty for the indebtedness of Oscar F. Burns, is the testimony of Roswell S. Burrows, the president of the bank. He says they were given for such purpose, and he produced an instrument, in the form of a certificate, executed by him as president, and given to Oscar F. Burns, stating the case, substantially, as found by the referee.

The entire transaction, touching the delivery of the bond and mortgage, and upon what terms, was between Burrows and Burns. Burrows never had any communication with Mrs. Burns. He paid nothing at the time the bond and mortgage were delivered. He had no actual knowledge that the premises mortgaged were the sole property of Mrs. Burns.

The counsel for the defendants make the point that the mortgage was never a valid security in the hands of the

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plaintiff, and cite a class of cases showing that a note, to be the subject of sale, must be an existing, valid note in the hands of the payee, and that when the note has no legal inception, vitality cannot be given to it by a transfer upon an illegal consideration. (*Hall v. Wilson*, 16 Barb., 548; *Hall v. Ernest*, 36 Barb., 585; *Dowe v. Schutt*, 2 Den., 621.) The counsel says the security was not valid in the hands of Burns. The pertinency of this point, and the cases cited, are not perceived, unless it was intended, as I infer from subsequent points, to take the position that the bank could not take the mortgage upon any terms other than an advance of money, at the time, for the full amount. And this raises the question whether Burns could deliver the bond and mortgage to the bank, and the bank could receive them in payment of Burns' existing indebtedness, or as a collateral security for such indebtedness, and in this way bind Mrs. Burns.

Cases are cited to show that an express power to sell confers no power to pledge, and that an agent cannot pledge the note of his principal as security for past and future advances to the agent. It seems to me that these cases are not applicable to the present case. In this case, by the bond, Burns acknowledged a debt of \$4,000 to the plaintiff, and the condition was to pay \$2,000, and interest, at the times mentioned, and the mortgage was conditioned for the payment of \$2,000, according to the condition of the bond. We are to assume that Mrs. Burns understood the terms of the bond, and that the debt then existing, or to be created, was the debt of her husband, and that she pledged her lands as security for his debt. There can be no presumption that he gave his bond to raise money for her. There is nothing in the case to show that, to her, there was any significance in the question whether the bond and mortgage were used in payment of a debt then existing, or one to be created at the time of delivery.

Whether Burns had authority to deliver the mortgage as collateral security for existing debts, and as a continuing security for future indebtedness, is a very different question; and if he had not this authority then, perhaps, the point first

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made by the learned counsel may be good ; that is, that the mortgage was never a valid security in the hands of the plaintiff. In my opinion, the delivery of the mortgage was valid as to \$2,000 indebtedness then existing ; though by the agreement between Burrows and Burns it was to be a security for future liabilities also. As to future liabilities, was the delivery valid, and binding upon the estate of Mrs. Burns ? We are to keep in mind that there is no evidence in the case, touching the authority of Burns, to affect the property rights of Mrs. Burns, other than the papers,—bond and mortgage—in the hands of Burns. As Burrows, president, &c., was named as obligee in the bond, and mortgagee in the mortgage, and as Mrs. Burns intrusted the mortgage to Burns, who had, by the bond, acknowledged himself indebted to Burrows, president, &c., I have no doubt the authority to deliver the mortgage with the bond should be inferred. But where is the evidence of any authority in Burns to agree with Burrows that the mortgage should be held as a collateral security for debts contracted by Burns at any future period ; that it should stand as a continuing guaranty for successive debts indefinitely ? No such authority can be fairly inferred from the written instruments. By them, the amount of the debt is not only fixed, but the manner and time of payment are fixed ; one-half in three, and one-half in six months. It was for the performance of this clearly expressed obligation that Mrs. Burns pledged her lands as surety. A surety may be quite willing to guarantee the payment of a certain debt, to become due within a short, fixed time, and yet be unwilling to assume the liability, if the time of payment is fixed for a later period, or is left indefinite.

The counsel for the plaintiff refers to cases to show that mortgages and judgments, in which the amount to be paid, and the time when, are specified, may be given to secure future advances ; and that this may be so, though it should not, in terms, be so specified in the mortgage or judgment. This is undoubtedly so ; but unless the agreement is expressed in the written instrument, that it shall stand as a continu

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ing guaranty, such agreement must be made by the parties to be bound, or their agents, duly authorized. No case, I apprehend, can be found where the obligation expresses simply the amount to be paid, and the time of payment, in which it has been held, in the absence of an agreement of the parties, that the instrument or obligation may be retained as a continuing guaranty for future liabilities. The cases cited by counsel are *Kendrick v. Robinson* (2 J. Ch. R., 309); *Brinckerhoff v. Marvin* (5 id., 326); *James v. Johnson* (6 id., 420); *Truscott v. King* (6 N. Y. R., 147, 157); *Livingston v. McKinley* (16 J. R., 165); *Shirros v. Caig* (7 Cranch., 34); *The Bank of Utica v. Finch* (3 Barb. Ch. R., 293); *Robinson v. Williams* (22 N. Y. R., 380); *Young v. Wilson* (27 N. Y., 351). In all these cases, the agreement was specified in the instrument, or outside of it, by the parties to be bound. Numerous other cases exist, but it is not necessary to refer to them here. The law is well stated by JEWETT, J., in *Truscott v. King, supra*, where the cases are very largely examined. He says: "The principle is well established that a mortgage or judgment may be taken and held as a security for future advances and responsibilities to the extent of it, when that forms a part of the original agreement between the parties."

In the case we are considering, Burns had no authority to use the mortgage as a security for future advances; and Mrs. Burns was not bound by such arrangement. *Smith v. Townsend* (25 N. Y. R., 479) is instructive upon this question. Townsend and wife executed a mortgage upon lands, some of which were her separate property, to the bank, as security for the payment of the indebtedness of Townsend, or the "Buffalo Car Company," then incurred, or thereafter to be incurred. A large debt accrued against the car company, and the bank, after the car company was insolvent, agreed to extend its payment upon certain conditions. Townsend agreed to the extension, but Mrs. Townsend did not; and the court held that her separate land, mortgaged, was discharged; and the Court of Appeals affirmed the judgment.

The husband had no authority to consent to the extension,

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for his wife and her lands, pledged as security, were discharged; so, in this case, Burns having no authority to pledge the mortgage as security for future liabilities, the mortgaged premises are not liable for such debts.

The point is made that Burrows had no knowledge that Mrs. Burns owned the land mortgaged; that he did not, therefore, know that the land was a security, furnished by a third person, for the debt of Burns; and the referee has found that Burrows had no knowledge or information that she was the owner. I really do not see how this fact can affect Mrs. Burns' rights touching the use that was made of the mortgage.

I hold that the mortgage was valid in the hands of the bank, precisely according to the terms of the bond. In *Smith v. Townsend*, there was nothing, at the time the mortgage was executed, to indicate in whom the title of the land was; and GOULD, J., said they were thrown back upon the legal presumption that the taker of a conveyance is held to take it according to the true title of the grantor, and with the knowledge of it. WRIGHT, J., said: It must be presumed that a mortgagee is cognizant of the title to the estate mortgaged, where there is no countervailing testimony. In the present case, the conveyance to Mrs. Burns was duly recorded, prior to the execution of the mortgage to Burrows, and this was notice of her title. The plaintiff is to be regarded as having notice that the land, described in the mortgage, was simply surety for the debt of Burns; and this brings us to the question, whether such surety has been discharged.

The referee has found that Burns was indebted to the bank \$4,178.14 at the time the mortgage was executed, and that but little, if any portion of the debt, was ever paid, but that the same was extended from time to time, new notes being given therefor; that Burns' indebtedness gradually increased to over \$14,000 at the time of his death (July, 1866). As I have come to the conclusion that the mortgage could not be held as a continuing security for the payment of future debts,

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thus differing with the referee, how will the facts just stated affect the case? The referee does not find that the notes and evidences of debt, existing at the time the mortgage was given, had not been delivered up to Burns upon the payment of cash or the making of new notes. The evidence shows that the account between the bank and Burns was continued in the usual way. Burns, from time to time, paid moneys into the bank, and made and delivered new notes, either upon new loans or in renewal of the debts he owed. No separate account of any \$2,000 indebtedness was ever kept, nor were the bond and mortgage ever applied to any specific indebtedness of \$2,000. As Burrows understood the matter, this was not necessary; but as we understand it now, the debt for which the land was pledged as security was a debt to be paid in three and six months, and the creditor had no right, as against the surety, to extend the time of payment and put it out of its power to enforce payment. The surety has always the right to pay the debt when it becomes due, and resort at once to the principal debtor for indemnity. This general dealing between the bank and Burns was continued from the execution of the mortgage (August, 1861), to the death of Burns, in July, 1866, several years after the death of Mrs. Burns. Burrows, understanding the mortgage to be a continuing guaranty, took, in April, 1865, Burns' note for \$2,000, without an indorser.

Some other questions are presented by the case and by counsel, but, in my view, it is not necessary to remark upon them. It may, however, be well to say, that Burns delivered to Burrows another mortgage, of the same date, for \$2,000, executed by himself and wife upon premises belonging to Burns, and for the purpose of securing his debt. In July, 1864, Burrows discharged this mortgage at the request of Burns. If the \$2,000 mortgage upon Mrs. Burns' lands had been a continuing guaranty, she or her heirs would have been entitled to the benefit of this \$3,000 mortgage. As Burns was the owner of this land covered by this mortgage, he had a right to deliver it as security for future advances.

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The authorities cited by the counsel for the plaintiff in support of the position that extensions of the time for the payment of the debt will not release the security, are not applicable to this case. The securities, in those cases, were not furnished by persons other than the debtor. That the extension of the time, by a valid agreement, will discharge the surety is shown by *Smith v. Townsend, supra*. It cannot be necessary to cite authorities to show that where the creditor takes a new note for the old debt, giving time, and thus putting it out of his power to sue upon the old debt until the time given by the new note has expired, it will discharge any surety for the payment of the old debt.

The judgment must be reversed, and there must be a new trial; costs reserved to the final hearing.

Judgment reversed.

DANIEL STAHL, Appellant, v. JOHN S. STAHL, Administrator,
&c., and ENOCH STAHL, Respondents.

(GENERAL TERM, EIGHTH DISTRICT, SEPTEMBER, 1869.)

An action upon a judgment against the defendants therein, entered in form against them jointly, is presumptively an action against joint debtors.

The plaintiff sued the representative of a deceased judgment debtor, and the surviving co-judgment debtor, upon a judgment in usual form, recovered nearly twenty years previously on contract against the defendants therein, alleging execution returned unsatisfied against the said defendants and the insolvency of the survivor.—*Held*, on demurrer by the administrator, for want of a cause of action, that the complaint was good.

It is sufficient, in such an action, if the complaint states the survivor's insolvency, without averring the issuing and return of an execution unsatisfied against him.

This was an appeal taken from an order granted upon a hearing at a Special Term of the court, whereby a demurrer interposed by the defendant John S. Stahl, was sustained to the complaint of the plaintiff in the action,

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which stated that in July, 1847, Wm. P. and Willard J. Daniels recovered a judgment in the Supreme Court against the defendants, Enoch Stahl and John Stahl, junior, for \$924.98, in an action on contract, on personal service of process. The docketing of the judgment was averred and that Wm. P. Daniels died prior to May 16, 1867, and left a will; the complaint named the executors and stated that they and Willard J. Daniels sold and transferred the judgment to the plaintiff May 16, 1867. That John Stahl, junior, was dead, and the defendant, John S. Stahl, was administrator, &c.; that the judgment remained wholly unpaid and unsatisfied, that the defendant, Enoch Stahl was entirely worthless and insolvent, and that execution had been issued to the sheriff of Niagara county, where the defendants resided, and returned wholly unsatisfied. Judgment was demanded against the defendants for \$924.98, with interest from July 2d, 1847.

The grounds of demurrer were:

1st. That no cause of action was stated against John S. Stahl, administrator of, &c.

2d. Defect of parties, defendant, in joining Stahl, a surviving joint debtor with John S. Stahl, administrator of, &c.

3d. That it did not appear that any action or proceeding had been had against Enoch Stahl, the surviving joint debtor, before commencement of this action, nor that the remedy against him had been exhausted, nor that he was insolvent.

4th. That several causes of action had been improperly joined, as the complaint set forth a cause of action at law against Enoch Stahl, and an equity action, or facts which required the equitable relief of the court, as to the other defendant. The court ordered judgment for the defendant, John S. Stahl, with liberty to the plaintiff to amend, &c.

Webster & Hunting, for the plaintiff.

L. F. Bowen, for the defendant.

Present—MARVIN, LAMONT and BARKER, JJ

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By the Court—MARVIN, P. J. Judgment was recovered against the two Stahl's in the Supreme Court, nearly twenty years before this action was commenced, in an action on contract. The plaintiff is the assignee of the judgment. One of the Stahl's is dead, and the defendant, John S. Stahl, is administrator of his goods, &c. The other judgment debtor, Stahl, is entirely worthless and insolvent, an execution had been issued upon the judgment and returned wholly unsatisfied, but when does not appear.

These facts are admitted by the administrator; but he insists that they are not sufficient to constitute a cause of action against him. I think we must hold that Enoch Stahl and John Stahl, Jr., were joint debtors. The judgment is the evidence of their indebtedness, and it is against them jointly. The judgment would have been in this form, if it had been recovered upon a demand rendering them liable jointly and severally. But as the action is upon the judgment, I think we must regard the liability at law as joint only. I understand it to be well settled, that an action at law could not be maintained upon any contract, whether joint or several, against a surviving debtor, and the personal representatives of a deceased co-debtor. The remedies against the surviving debtor, and the representatives of the deceased co-debtor, and the judgments to be entered, were different, and, in practice, they could not be united and carried into effect together. If the obligation was joint and several, a separate action could be maintained against the surviving debtor, and the representatives of the deceased. If the obligation was joint only, then, at law, the action was confined to the survivor; but, as great injustice might happen to the creditor, in case he should be deprived, as he was at law, of any remedy against the estate of a solvent deceased debtor, the surviving debtor being entirely insolvent, courts of equity interposed and afforded the remedy. As it was a rule in courts of equity, that the court would not take jurisdiction, and give relief in cases where the remedy was adequate at law; and as the remedy against the surviving debtor was clear and ade-

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quate, in case he was solvent, the Court of Equity would not entertain jurisdiction. It was necessary that it should appear that the debt could not be collected of the surviving debtor; that he was insolvent; and as the recovery of a judgment, and the issuing of an execution, in proper form and to the proper sheriff, and its return unsatisfied, are generally regarded as the most satisfactory evidence of insolvency, I had supposed that this was the only evidence of insolvency which would be received by the court, and that these facts must appear in the complaint. I have consulted the cases, some of them quite recent, referred to by the respective counsel, and I am not sure that my previous impressions have been correct.

In *Butts v. Genung* (5 Paige, 256), the chancellor said: "There is no doubt as to the liability, in equity, of the real as well as the personal estate of the deceased partner, for the payment of the partnership debts, the surviving partner being insolvent and unable to pay anything." In that case a judgment had been recovered against the surviving partner, and an execution returned unsatisfied. He was made a party, and the chancellor said that he was not an improper party so as to make the bill multifarious.

In *Lawrence v. The Trustees, &c.* (2 Den., 577), there was an allegation in the bill, that a recovery at law had been had against the surviving partner, and that an execution had been returned unsatisfied, and that he was insolvent. In *Voorhies v. Childs' Executors* (17 N. Y. R., 354), the action was against the surviving partners, and the personal representative of a deceased partner, upon a note of the firm. There was no averment of a previous suit against the surviving partners, or of their insolvency. The representative of the deceased partner demurred on the ground that the complaint did not state a cause of action against him; and it was held that the personal representative of the deceased partner could not be joined as a party defendant with the surviving partners, when the complaint does not show the plaintiff's inability to procure satisfaction from the survivors.

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It was supposed at one time, by some of the profession, that the Code had changed the law as to parties in such cases; and SELDEN, J., considers, at length, various provisions of the Code, and shows that they have not, in such cases changed the old rules; and after noticing the law, as administered by the English courts of equity, he says that it may be regarded as having been settled in this state, prior to the Code, that the creditor, in such a case, could not come into a court of equity, without showing either that the surviving partners had been proceeded against by execution at law, or that they were insolvent. Several of the judges concurred in the result, upon the ground that the complaint made no cause of action against the personal representative, reserving the question whether the insolvency of the surviving partners, or of the partnership estate, would justify a joint action against the survivors and the representatives of the deceased partner.

In *Hammersley v. Lambert and others* (2 J. Ch. R., 508), the chancellor says: It is well settled that relief may be had in equity against the representatives of a deceased partner having assets, if the surviving partner be insolvent. Also that the defendants could not set up a want of due diligence in not prosecuting the surviving partner before his insolvency. It appeared that the surviving partner had been discharged under the insolvent act, within four years of the death of his copartner, and the chancellor said this was a good plea in bar to any suit by a creditor. But the decision is put upon the broad ground that the suit can be maintained against the representative, in case the surviving partner is insolvent.

In *Moorhouse v. Ballou* (16 Barb., 289), there was no averment of the insolvency of the surviving debtor.

In *Yorks v. Peck* (14 Barb., 644), the action was against one of the makers of a joint note and the representatives of the deceased joint maker. The cause was tried by a referee, and a general judgment was rendered against the defendants for the amount of the note. The case came before the General Term upon appeal. The complaint contained no

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avermment of the insolvency of the surviving debtor, but it seems this appeared from the evidence on the trial; and STRONG, J., in his opinion, remarked that the action was analogous to a suit in equity in the late Court of Chancery, against the representatives of a deceased joint debtor upon the insolvency of the survivor, and that the surviving debtor was a proper party, and it was decided that the judgment was not erroneous. Justice STRONG recognizes the rule, before the Code, to have been that no joint action could be maintained against a surviving debtor and the representatives of the deceased joint contractor, except in cases where the survivor was insolvent. He intimates a doubt whether this is so under the Code. This doubt has since been removed by the Court of Appeals. (*Voorhies v. Childs' representatives, supra.*)

I doubt whether *Yorks v. Peck*, would now be sustained, without an amendment of the complaint alleging the insolvency of the surviving debtor, and thus conforming it to the proof, and also a correction of the judgment.

It may be as well to say here, that in equity the contracts of partners and other debtors, though in form joint only, are regarded as several where some of the debtors or contractors have died. This rule prevails in England and this country; and in England it led the court to entertain jurisdiction of a suit against the representatives of a deceased partner to enforce payment of the debt out of assets, without regard to any proceedings at law against the surviving partner.

In this country this principle has not been so applied. Here courts of equity require that the remedy at law, against the surviving debtor should be exhausted, or that it should appear in the bill or complaint that he was insolvent, before a suit in equity can be maintained against the representatives of the deceased debtor to reach assets. See the cases, *supra*, Story, Eq. Plea., § 178, and notes, § 167.

In applying the principle established by the authorities to the present case, I have come to the conclusion, that the complaint does state facts sufficient to constitute a cause of action against John S. Stahl, the administrator of, &c. John

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Stahl, junior. It is an action in equity against him to reach and apply the assets in his hands to the payment of the debt. The averment in the complaint, of the entire worthlessness and insolvency of Enoch Stahl, the surviving debtor, is sufficient to give the court jurisdiction in equity to proceed against the representatives of John Stahl, junior.

The authorities show that Enoch Stahl, the surviving debtor, was a proper party; but whether he is a necessary party, was left undecided in *Butts v. Genung* (5 Paige, 254). The reason assigned in the English cases for joining the surviving partner is, that it is necessary to an entire account of the assets, and that the survivor is interested to contest the demand of the plaintiff and of all persons claiming to be joint debtors. (See Story, Eq. Plea., § 178, and note.) It is said that no decree can be made against him in such suit.

I very much doubt whether, in the present case, Enoch Stahl was a necessary party. It does not appear that the debt, upon which the judgment was recovered, was a *partnership* debt; and as a judgment has been recovered upon it, I am not able to see what interest Enoch has to be protected in this action. But it is not necessary to express any opinion upon this question. It is enough that a good cause of action is stated against the administrator. Several causes of action are not, in this case, improperly united. It is an action in equity against the representative of the deceased debtor, and Enoch Stahl, the surviving debtor, was a proper party; and all the material facts stated, were necessarily stated to show a cause of action against the representative, and the propriety of making Enoch Stahl a party. It is quite probable that the pleader took a different view of his case, and we may infer this from the demand for judgment; but there can be no demurrer to the demand for judgment. A demurrer can only be interposed to the facts stated in the complaint. When there is no answer, the relief cannot exceed the demand in the complaint; in other cases, the court may grant any relief consistent with the case made by the complaint, and embraced within the issue. (Code, § 275.)

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It may be well for the plaintiff's counsel to consider whether, in case the defendant, John S. Stahl, shall fail to answer, he will be able to obtain the relief he needs, and which is consistent with the case made against John S. Stahl by the complaint.

The order of the Special Term should be reversed, and the plaintiff should have judgment upon the demurrer, with leave to the defendant to withdraw it and answer, on payment of costs.

Judgment reversed.

PHILIP R. CLARK, Appellant, v. WILLIAM BAMER, Respondent.

(GENERAL TERM, EIGHTH DISTRICT, NOVEMBER, 1869.)

On the trial of an action to recover damages for false and fraudulent representations of soundness, on a sale of sheep, which turned out to be diseased, the plaintiff excepted to a charge "that if defendant knew facts tending to prove that the sheep were unsound, and fraudulently concealed those facts, he is liable," and requested the court to omit the word "fraudulently," which request was refused, with the remark that "the word fraudulently might be omitted and the jury might infer fraud; but there must be fraud."—*Held*, on appeal, that there was no error.

The doctrine of *Binnard v. Spring* (42 Barb., 470), in this respect re-affirmed.

APPEAL from a judgment entered upon a verdict. The facts appear in the opinion of the court.

N. Morey, for the appellant.

Parker & Chamberlain, for the respondent.

Present—MARVIN, LAMONT and BARKER, JJ.

By the Court—MARVIN, P. J. The action was for fraud, in fraudulently and falsely representing certain sheep to be

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"all right every way;" that such representation was made with intent to deceive and defraud the plaintiff. The plaintiff, relying upon the representation, purchased the sheep (two in number); that they were infected with a contagious disease, known as the scab, and were worthless, &c.; and they communicated the disease to the plaintiff's other sheep.

The evidence given by the plaintiff tended to prove the allegations of the complaint, and the evidence given by the defendant tended to prove the contrary.

There was some evidence tending to prove that the defendant had some knowledge that the sheep were diseased, which he did not communicate to the plaintiff, or a knowledge of some circumstances, calculated to excite suspicion that the sheep were not all right; and which circumstances he did not communicate to the plaintiff, and evidence tending to prove the contrary.

The court charged the jury:

1st. "If the defendant represented that there was no disease about the sheep, or that they were 'all right,' and they were diseased, and the defendant knew it, then his representation was fraudulent, and he is liable.

2d. "If the defendant represented the sheep to be all right, knowing the representation to be false, or if he had no knowledge whether the sheep were sound or not, and no ground for the belief that they were sound, then the jury may infer that the representations were fraudulently made.

3d. "So, if the defendant positively asserted, as of his own knowledge, that the sheep were sound, or all right, and this affirmation was false, then the jury may infer that the representation was fraudulent.

4th. "If the defendant knew facts, tending to prove that the sheep were unsound, and he fraudulently concealed those facts, then he is liable.

5th. "If the jury find that the defendant had good reason to believe that the sheep were healthy and sound, and made the representations honestly and in good faith, and was

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not guilty of any fraudulent concealments, then he is not liable."

The counsel for the plaintiff requested the court to leave out the word fraudulently, in the fourth proposition, relating to concealment, and charge the proposition without such qualification. The court refused, and the plaintiff's counsel excepted. The court remarked that the word "fraudulently," might be omitted, and the jury might infer fraud; but there must be fraud.

The verdict was for the defendant.

The *gravamen* of the action was fraud. It is evident that the charge in this case was carefully made in view of recent decisions by the Court of Appeals, in which the action for fraud, founded upon untrue representations, has been maintained, though the evidence failed to show directly the knowledge of the party making the representations that they were untrue. This knowledge or *scienter* has been inferred, or the jury from the character of the facts proved as stated in the cases has been permitted to pass upon the question of fraud, and to infer it. But the distinction between fraud and warranty has not been abrogated. It is still preserved. In this case the only complaint made of the charge by the plaintiff is, that the court upon the question of concealment put the case to the jury with the qualification that the concealment must have been *fraudulent*.

The charge is: "If the defendant knew facts tending to prove that the sheep were unsound, and fraudulently concealed these facts, then he is liable." The justice used the language of the books, and when his attention was called to the word fraudulently he remarked that it might be omitted, and the jury might infer fraud, but there must be fraud, there could have been no misapprehension. It was asserting that the gist of the action was fraud. If fraud had been excluded from the proposition, and the jury had found that the defendant knew facts tending to prove that the sheep were unsound and did not communicate such facts, then the verdict must have been against him; though the plaintiff might have

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known other facts tending to prove that the sheep were entirely sound and which fact satisfied his mind that they were sound and not diseased, and might have sold them in entire good faith, believing that there was no disease about them. No such proposition can be maintained. It would be extremely dangerous. I do not deem it necessary to pursue the question further. I had occasion in *Binnard v. Spring* (42 Barb., 470), to examine with some care the recent cases in the Court of Appeals, touching fraud in sales, and the text of Story generally cited, and the authorities upon which the proposition in Story was founded, and I showed or attempted to show that the rule that the *scienter* must be proved was not abrogated; that the court or jury must find fraud; that fraud was the gist of the action, and that the distinction between fraud and warranty was preserved.

I am satisfied with the doctrine as laid down by Kent in his thirty-ninth lecture "Of the duty of mutual disclosures, (v. 2, p. 482.) He says: "If there be an *intentional* concealment or suppression of material facts in the making of a contract in cases in which both parties have not equal access to the means of information, it will be deemed unfair dealing and will vitiate and avoid the contract." Such *intentional* concealment would be a *fraudulent* concealment. Further on Kent says: "The *inference* of fraud is easily and almost inevitably drawn when there is a suppression or concealment of material circumstances, and one of the contracting parties is, knowingly, suffered to deal under a delusion." The concealment must be intentional. There was no error in the charge of which the plaintiff can complain, and the judgment must be affirmed.

Judgment affirmed.

Bulymore v. Cooper.

RICHARD BULLYMORE, Appellant, v. WM. COOPER, Jr., Sheriff, &c., Respondent.

(GENERAL TERM, EIGHTH DISTRICT, NOVEMBER, 1869.)

An order of a County Court (under art. 6, tit. 1, chap. 5, part 2, R. S.), directing the discharge of a debtor imprisoned in execution, is invalid on its face, unless it recites the proceedings necessary under the statute to vest the court with jurisdiction.

If the sheriff releases the debtor under an order omitting such recitals, when the court in fact had not jurisdiction to make it, he renders himself liable as for an escape.

The court will not obtain jurisdiction to make the order of discharge unless the applicant verifies his petition at the time he presents it.

Where, therefore, the sheriff released a prisoner in execution, under an order whose recitals showed the applicants neglect to swear, that he had not disposed of any part of his property with a view to the future benefit of himself or his family, and the order had, in fact, been made upon a petition which was not verified at the proper time, and was for that reason void.—*Held*, that he was not protected, but was liable for an escape.

Whether the applicant for discharge can meet the requirements of the statute (§ 4), respecting “a just and true account of all his estate, &c.,” by alleging, in his petition, an adjudication and assignment in bankruptcy. *Quera*.

APPEAL by the plaintiff from a judgment in favor of the defendant, rendered after trial by the court.

The action was against the sheriff of Cattaraugus county, seeking to recover for the escape of Flint and Bullock, who had been severally arrested and imprisoned in execution upon a judgment recovered against them in November, 1868, on allegations of fraud, for \$170.86, for which amount the complainant demanded judgment.

The defendant sought to justify under orders of the Cattaraugus County Court, which were dated respectively March 5th and 30th, 1869, and in the case of each debtor were substantially alike. The order in respect to Bullock, was as follows, viz. :

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At a County Court, held in and for the county of Cattaraugus, at the Court House, in the village of Little Valley, commencing on the first day of March, 1869.

Present—Hon. R. LAMB, County Judge.

March 5th, 1869.

IN THE MATTER OF NORMAN BULLOCK, }
AN IMPRISONED DEBTOR. }

On reading and filing the petition of the above named Norman Bullock, praying for an order that the said Norman Bullock be discharged from imprisonment upon an execution issued out of the Supreme Court, in an action wherein Richard Bullymore was plaintiff, and Abner N. Flint and Norman Bullock were defendants, judgment was entered or docketed in Cattaraugus county, on the 18th day of November, 1868; and on reading and filing the inventory or schedule annexed to said petition, and the affidavit of the said Norman Bullock thereto annexed, and the said inventory containing a just and true schedule of all the said Bullock's property, either in law or equity, and all securities, choses in action or property, of whatever name or nature, and that the said Bullock has not disposed of any of his property, at any time, with a view to hinder, cheat, delay or defraud his creditors; and on filing due proof of personal service of a copy of the petition, affidavit, inventory and notice of motion upon the attorneys for the plaintiff, in said judgment and execution, fourteen days previous to the hearing thereof; and the said Norman Bullock being brought before the court personally, on motion of J. R. Jewell, of counsel for the petitioner, it is ordered that the said Norman Bullock be, and he is hereby discharged from his imprisonment under and in pursuance of the execution aforesaid.

(Copy.)

E. C. BROOKS,

Clerk.

It appeared that the defendant had released the debtors from imprisonment in good faith, upon service on him of these orders, on the days of their respective dates.

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The petition upon which the order for the discharge of Flint had been granted was dated March 13th, 1869. After setting forth his imprisonment for more than sixty days (but not stating at what time it began), and the cause thereof, it concluded as follows :

“And your petitioner further shows that prior to the rendition of said judgment, he filed his petition in bankruptcy, in the office of the clerk of the District Court of the United States for the northern district of New York, and on the 24th day of June, 1868, was duly declared and adjudged a bankrupt, under the provisions of the bankrupt law of the United States, passed March 2, 1867, entitled “An act to establish a uniform system of bankruptcy throughout the United States;” that on the tenth day of August, 1868, George L. Winters of Ellicottville, was duly appointed an assignee of all his property for the benefit of creditors, and that your petitioner has no property whatever, either real or personal, either in law or equity, wherewith to make an account under the provisions of article 6, chapter 5, part 2d, title 1 of the Revised Statutes, and that said proceedings in bankruptcy are still pending, and that your petitioner has a family who need his services for their support, wherefore your petitioner prays that he may be discharged from his said imprisonment.” It was signed and verified by an affidavit written underneath, viz. :

“I, Abner N. Flint, the within named petitioner, do swear that the petition and account of my estate, and of the charges therein, hereto annexed, are in all respects just and true, and that I have not at any time, or in any manner, disposed of or made over any part of my property, with a view to the future benefit of myself or my family, or with an intent to injure or defraud any of my creditors.”

No account of property, &c., as required by the statute, was annexed.

The petition in the case of Bullock, was in the form required, and had annexed to it a schedule of property, &c., as directed by the statute. It was dated the 17th of Feb-

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ruary, 1869, and was signed and verified by Bullock on the same day by an affidavit also underwritten as follows: "I, the petitioner named in the foregoing petition by me subscribed, do swear that the foregoing petition is in all respects just and true, and that I have not at any time, or in any manner, disposed of or made over any amount of my property, with a view to the future benefit of myself or my family, or with intent to injure or defraud any of my creditors;" sworn, &c.

The petitions were both served on the plaintiff after their verification, and fourteen days before the presentation thereof to the court. The discharge in each case was granted without any assignment of the property of the applicant, or appointment of an assignee, or order for an assignment having been made. It was conceded that the plaintiff should recover, if at all, the amount demanded.

Benj. H. Austin, Jr., for the appellant.

Cary & Bolles, for the respondent.

Present—MARVIN, DANIELS, LAMONT and BARKER, JJ.

By the Court—LAMONT, J. The defendant who is sheriff of Cattaraugus county, discharged two execution debtors from imprisonment, under an order of the County Court of that county, purporting to have been granted in proceedings taken by them under article 6, title 1, chap. 5, part 2 of the Revised Statutes, entitled "Of voluntary assignments by a debtor imprisoned in execution in civil causes." The plaintiff was the judgment creditor and sues the sheriff for an escape. Two questions arise in the case: First, whether the order of discharge was authorized by the proceedings taken for that purpose; and secondly, whether the order was upon its face regular so as to afford a justification to the officer who executed it.

The rules of law which apply to the party and to the ministerial officer, touching their respective liabilities, are sufficiently defined in the following authorities: When the

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prisoner has been discharged from his imprisonment by the order of a court or judicial officer, it has been held a good defence for the sheriff, in an action for the escape, provided the court or officer making the order had jurisdiction to make it, even though such order was erroneously made and might be avoided; otherwise, however, where the order is void upon its face, or is granted by an officer who has no jurisdiction in the matter. (*Wilckens v. Willet*, 1 Keyes, 524.) Where fourteen days have not elapsed between the arrest and order of discharge, the court will assume for the protection of the sheriff that full notice of the application of the insolvent was waived where the order of discharge is perfectly regular on its face. (*Hart v. Dubois*, 20 Wend., 236.) The general rule is, if the justice has jurisdiction of the subject-matter, and if the process is regular upon its face, he (the officer) is protected (*Webber v. Gay*, 24 Wend., 487), even though the officer may have some outside information that no jurisdiction has been obtained. (*People v. Warren*, 5 Ell, 440.) In *Chegaray v. Jenkins* (5 N. Y. R., 376), the defendant justified under a tax warrant issued to him as a constable; and the court say it was no part of his duty to overrule or dispute the authority of his superiors, unless upon grounds apparent on the face of their mandate (p. 381).

Where an order on its face is such as the officer from whom it emanates may make for the guidance and control of another officer, the latter may justify under the order alone, without showing that jurisdiction had been acquired in the particular case in which the order was made. On this principle the process of a court of limited jurisdiction will, alone, furnish a justification to the ministerial officer to whom it is directed, and who obeys its mandate. (*Bennett v. Burch*, 1 Denio, 145-6.) Ever since the case of *Savacool v. Boughton* (5 Wend., 170), a ministerial officer is protected in the execution of process regular on its face, and coming from a court or body of men having jurisdiction of the subject-matter. (*Sheldon v. Van Buskirk*, 2 N. Y., 477.) The process being void, the party who set it in motion, and all persons aiding

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and assisting him are *prima facie* trespassers. If though void as respects the party, it is yet regular and apparently valid on its face; it will protect the officer against an action on the principle of *Savacool v. Boughton*; but the protection being extended to the officer, upon motives of policy, will not at all aid the party. (*Kerr v. Mount*, 28 N. Y. R., 665.)

The proceedings are assailable for want of jurisdiction in a proceeding brought to review or reverse them, but are not assailable for want of jurisdiction in an action against the officer or other collateral proceeding where the court or officer has acted, though erroneously, in deciding upon matters before him for judicial determination. (*Porter v. Purdy*, 29 N. Y. R., 113.) It was observed in the last case that as the law was supposed to stand in this State before *Savacool v. Boughton* was decided, an officer was not protected by process fair on its face, if the officer or court issuing it had not jurisdiction to issue it. But the rule became settled in *Savacool v. Boughton*, and has ever since been adhered to, that a ministerial officer is protected in the execution of process, whether the same issue from a court of limited or general jurisdiction, although such court have not, in fact, jurisdiction in the case, provided that on the face of the process it appears that the court has jurisdiction of the subject-matter, and nothing appears in the same to apprise the officer, but that the court also has jurisdiction of the person of the party to be affected by the process. The officer, when sued, may defend under such process, but he cannot build up a title upon it, which will enable him to maintain actions against third persons. (*Horton v. Hendershot*, 1 Hill, 119.)

On the authorities, it is quite clear that a simple order of the County Court, discharging the imprisoned debtor, without any statement or recital of the previous proceedings required by the statute, would be invalid upon its face, for the reason that the County Court is not invested by law with the general jurisdiction of discharging imprisoned debtors. The authority is special and limited, and the writ,

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process, or order of discharge, must show the jurisdiction upon its face.

The petition and account of property under "section 4" of this title of the Revised Statutes, as the debtor's estate and the charges on it, existed at the time of his imprisonment (*i. e.* his arrest), and as they exist at the time of preparing such petition must be made out, the affidavit as provided in the fifth section must be indorsed on the petition, and the oath to the affidavit taken at the time of presenting the petition.

The sixth section shows how and where the County Court becomes vested with jurisdiction of the case. Upon the presenting such petition, and due proof being made of the service of a copy thereof, and of the account thereto annexed, with the notice hereinbefore required (which is the fourteen days notice to the creditor with a copy of the petition and account), the court shall order the applicant to be brought before it. The only verification of the petition and account of the debtor's estate is the affidavit, a special form for which is contained in section 5. As served on the judgment creditor the petition and the account of the imprisoned debtor's property are not required by the statute to be sworn to. It is only after the creditor has had time for investigation and inquiry into the truth of the petition and the account, and especially into the state of the debtor's pecuniary circumstances, both at the time of his arrest on the execution, and at the time of his preparing the petition, that the statute exacts the affidavit to verify the petition and the account, when the creditor may if he chooses be present to see the oath taken.

This affidavit, then, to be sworn, is an important part of the proceeding; and the legislature has seen fit to prescribe its very form and words: "I, the within named petitioner, do swear (or affirm as the case may be) that the within petition and account of my estate and of the charges thereon, are in all respects just and true, and that I have not at any time or in any manner, disposed of or made over any part of my property, with a view to the future benefit of myself or my

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family, or with an intent to injure or defraud any of my creditors."

The statute exacts this particular affidavit to be indorsed on the petition. It is unsafe to depart from its language as prescribed by the statute. The petition and the account or rather the two accounts of the debtor's property at two different times are thus verified. And the court acquires no jurisdiction unless a strict compliance is shown with the provisions of the statute. This is illustrated in the *People v. Bancker* (1 Seld., 106), in a very able opinion upon the jurisdictional question delivered by the late Justice MULLETT.

The papers in the case show that the affidavits of both judgment debtors, Flint and Bullock, verifying their petitions were taken before the petitions were served on the creditors, and not at the time of presenting them to the court. This is fatal to the jurisdiction. (*Brown v. Bradley*, 5 Abb., 141.)

Flint gave no account of his property whatever, nor does his petition show when he was arrested, whether before or after the adjudication of bankruptcy, although the bankruptcy and appointment of an assignee are put forward as an excuse for omitting such account. But the petition ought to have shown when he was arrested, and that such arrest was after he was divested of his property by the bankrupt proceeding. If he was arrested before the assignee was appointed he must give an account of his property as it existed at the time of his imprisonment, as well as at the time of preparing his petition. The bankruptcy did not vest in the assignee any property exempt from execution by the laws of this State, or of the United States, and perhaps \$500 more. Bankrupt act, (§ 14.) The act of congress provides that none of this exempt property shall pass to the assignee or the title of the bankrupt thereto be impaired or affected by any of the provisions of the bankrupt law. In *People v. Bancker*, the debtor had made an assignment of his property for the payment of his debts, and therefore claimed to have no property whereof to make an account, but the Court of Appeals held that his peti-

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tion was void for want of an account. Admitting, say the court, that assignment to have been fair and valid, still it was an assignment in trust, which might leave him a large residuary balance, which would be property in equity at least.

Now, I admit that the sheriff will stand justified by his order of discharge if that states on its face the necessary jurisdictional facts even though such statement be false. He need only look to the face of his process or order. If the order is not sufficient upon its face he cannot justify upon the proceedings actually taken when the latter also disclose a fatal want of jurisdiction. In *Wiles v. Brown* (3 Barb., 37), the commissioner who discharged on *habeas corpus*, a defendant imprisoned on execution by civil process had obtained jurisdiction of the subject-matter and of the person; and although his decision to grant the discharge, was against a positive statute, it was held that the sheriff was not liable to damages for an escape by discharging the execution debtor pursuant to the commissioner's writ of discharge.

I doubt that the sheriff could be made liable on the ground that the order of discharge was silent upon the subject of the appointment by the County Court, of assignees for the debtor, or of the order for an assignment to be made, or of the actual making of the assignment, or of giving security to deliver, &c., or of furnishing proof upon these subjects (sections 6 to 11.) These are proceedings intermediate the vesting of the jurisdiction in the County Court by the petition, &c., and the final order of discharge. If the court obtained jurisdiction of the subject-matter of the proceeding and of the requisite persons, and after judicially examining the matters makes a final order of discharge, and these facts sufficiently appear in the latter order to the sheriff, that order becomes his sufficient protection whatever errors intervene during the course of the proceeding.

Does this order of discharge disclose a want of jurisdiction on its face? If it does the sheriff must fail in the action; because, most undoubtedly, the orders of discharge were not

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authorized in the proceedings taken for that purpose. (*Stanton v. Ellis*, 2 Kernan, 578; *Hale v. Sweet*, 40 N. Y. R., 97.)

In the case *Castellanos v. Jones* (1 Seld., 164), the court held that the attachment showed on its face a want of jurisdiction in the officers to issue it. The warrant of attachment in that case purported to be taken out under the provisions of the Revised Statutes concerning attachments against absconding, concealed and non-resident debtors. (2 R. S., 1, &c.) The statute itself does not state what recitals, or that any recitals of the preliminary jurisdictional facts of proofs shall be contained in the warrant of attachment; but the warrant, as issued, did contain a recital of certain facts of that description which, however, did not show enough to confer jurisdiction. And for these *omissions* to recite enough, the warrant was held void on its face.

In the present case the order of discharge, made by the County Court, purports to recite the proceedings that give that court jurisdiction, and, among other things, the affidavit required by section 5, to be indorsed on the petition of the imprisoned debtor at the time of its presentation to the court.

The statute made it necessary that this affidavit should contain the statement that the debtor has not at any time or in any manner, disposed of or made over any part of his property, with a view to the future benefit of himself or his family. The orders in question, though purporting to make a statement of the contents of the affidavit, are here chargeable with a fatal omission. (*Hale v. Sweet*, 40 N. Y. R., 97.) It is said in *Chegaray v. Jenkins* (1 Seld., 381), that the general principle is, that the proceedings of magistrates and officers having special and limited jurisdiction, must bear on their face the evidence of their jurisdiction, or they will be adjudged invalid; and that in collateral actions their judgments may be questioned and disregarded if it appears that, in fact, they had no authority to act in the given case.

Again, both orders of discharge made by the County Court, in professing to give the contents of the petitioner's

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affidavits, show on their face that the *petitions* were not verified, but only the *inventories*.

On the face of each order a want of jurisdiction in the County Court was disclosed to the sheriff who executed it. He cannot, therefore, justify himself in this action by the bare production of the orders as he might do if they were strictly regular upon their face; and if he attempts to go behind the order, and adduces the proceedings had in the County Court, he may produce a good formal affidavit; but the affidavit was not taken at the time of presenting the petition to the court, and the proceedings actually taken, turn out to be unauthorized and void. The sheriff, therefore, stands in such a predicament that he cannot justify, either upon the face of his orders or upon the proceedings in the County Court.

The authorities cited, and particularly the decision in *Castellanos v. Jones*, appear to me to be decisive against the sheriff, acting as he did in perfect good faith, his disposition of the case operates as a hardship upon him, which the court cannot but regret; but the rights of parties also deserve consideration, and no rule of law would be tolerable which did not guard the interests of parties from being sacrificed by unauthorized summary proceedings like the one in question.

The judgment appealed from should be reversed, and a new trial granted, with costs to abide the event.

Judgment reversed.

WILLIS G. CHAFFEE v. DANIEL G. FORT, as the Assignee of
JAMES H. GOLDEY.

(GENERAL TERM, FIFTH DISTRICT, JANUARY, 1870.)

If an insolvent, who is carrying on business with knowledge that he can no longer continue it, and that his property must be surrendered to his creditors, purchases goods upon credit without disclosing the circumstances to the vendor, his concealment thereof is equivalent to fraud, and his assignment of the purchased property for the benefit of his creditors will pass no title therein to his assignee.

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And this is so, although the purchase is made in the course of the purchaser's business.

The same rule applies to a banker, who, under like circumstances, receives the money of his depositor.

A banker in business on his own account, but insolvent, and intending an immediate general assignment, unless assisted during the day, receives a sum of money for deposit from one of his depositors who is ignorant of the insolvency, and he makes an entry thereof in the depositor's bank book, but keeps the money in a separate parcel, labeled with the depositor's name, intending to redeliver it if he shall assign; he makes no entry in his own books except a memorandum in his cash book, beneath which he writes the depositor's name; and afterward, on the same day, he assigns his property generally for the benefit of his creditors, and delivers the parcel to the assignee with a request that he will, if he may legally, give it to the depositor.—*Held*, that the assignee took no title to the deposit.

The delivery of the parcel to the assignee, addressed to the depositor for delivery to him, was in effect a delivery to the latter, and after a demand of the amount the assignee was merely his bailee.

THIS was a controversy submitted without action, under section 372 of the Code, upon a case agreed upon by the parties as follows:

“On the 8th day of September, 1869, James H. Goldey was and for several years prior thereto, had been a private banker (though not an individual banker under the statute), keeping an office and doing business in the city of Oswego. His business was buying and selling gold and silver coin, selling drafts, cashing checks, discounting notes and bills of exchange, and receiving money on deposit, subject to the check or call of the depositor.

Willis G. Chaffee, the plaintiff, was a regular depositor at the banking office of said Goldey, and had a bank book in the usual form in which his deposits, when made, were entered.

For six months or more, prior to the 8th day of September, 1869, the said Goldey had been in fact insolvent, and on the evening of the 7th day of September, 1869, he became satisfied of his insolvency, and that he would be unable to continue business for many days unless he received pecuniary aid. He hoped and expected to receive such aid from a friend on the next day, and he decided on the evening of September 7th, that unless he received such aid during the next day,

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(September 8th) he would stop business and make an assignment of all of his property in trust for his creditors on the morning of the 9th day of September, 1869.

On the morning of September 8th, he opened his office as usual and received deposits, and paid checks in the ordinary way, until about half-past twelve o'clock in the afternoon of that day, when, at the suggestion of a friend who was aware of his circumstances, he decided to keep in separate packages the deposits of money received after that time, and to mark such packages with the names of the depositors respectively. This was done. The deposits received on the 8th of September, 1869, prior to half-past twelve P. M., were mingled with his other funds as usual.

At half-past twelve P. M. of September 8th, said Goldey wrote in pencil upon the cash book, in his office, in which deposits were entered to the credit of the depositors, and in which the deposits made during the forenoon of that day had been so entered, immediately under the name of the last depositor, these words, to wit: "Half-past twelve P. M. credit no more deposits up." During the afternoon of September 8th, and after half-past twelve P. M., the plaintiff went to the office of said Goldey with his bank book and eighty dollars in currency, and delivered the same over the counter to Goldey, who received the money, entered the amount thereof in said bank book to the credit of the plaintiff, returned the said book to the plaintiff, who took the same and went away.

The said sum of eighty dollars was not placed to the credit of the said plaintiff on the cash book of said Goldey, or any book kept in his office at the time the same was received, nor was the same in any way mingled with the other funds of said Goldey; but on the contrary, immediately after said plaintiff left the office as aforesaid, the said Goldey made a package of the said identical eighty dollars delivered to him by said plaintiff as aforesaid, wrote upon said package the words and figures following, to wit: "W. G. Chaffee, \$80.00," and laid the same away by itself. Subsequently, on the same day, and before executing his assignment for the purpose of making up

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his cash account, the said eighty dollars was entered to the credit of said plaintiff on said Goldey's cash book, but below the memorandum in pencil above mentioned. The same course was taken with all of the money delivered to said Goldey by depositors during the said afternoon of September 8th, and subsequent to half-past twelve of that afternoon.

It was the intention of said Goldey, when he received the said eighty dollars from the plaintiff, and made up and marked the package as aforesaid, that the same should be redelivered to the plaintiff in case he, said Goldey, made a general assignment.

During the afternoon of the said 8th day of September, 1869, the said Goldey counted out sums of money equal in amount to the several deposits received by him on that day prior to half-past twelve P. M., placed the sums in separate packages, and wrote upon each package the name of the person whose deposit corresponded in amount with the sum in such package. It was likewise the intention of said Goldey, when he made up and marked the said last mentioned packages, that the same should be delivered to the several depositors whose names were written upon them respectively, in case he made a general assignment. And upon the delivery of his assignment to the defendant, as hereinafter mentioned, the said Goldey also delivered to the said defendant said last mentioned packages of money and also the packages of money delivered to him by depositors during said afternoon, including the package of eighty dollars delivered by the plaintiff as aforesaid, and requested the said defendant to deliver the same to the several depositors whose names were written thereon respectively, if he could legally do so.

The said Goldey did not receive pecuniary aid, as he had hoped and expected, and accordingly at about ten o'clock in the evening of said 8th day of September, 1869, he duly executed an assignment of all his property, real and personal, to said defendant in trust for the creditors of him, said Goldey, making no preferences. And on the morning of the 8th day of September, 1869, the said Goldey duly delivered

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the said assignment to the defendant, who duly accepted the same and the trust therein and thereby reposed in him, and duly qualified as such assignee.

The defendant has since kept and now keeps the said packages of money, in the same state and condition they were in when received by him from said Goldey as aforesaid.

The plaintiff did not know, and was not informed in any way until after the execution and delivery of said assignment that said Goldey was insolvent, or that he was or had been financially embarrassed.

Immediately after learning of the execution and delivery of said assignment, the said plaintiff demanded from the said defendant the said package of eighty dollars in money, and the defendant refused to deliver the same.

The said defendant claims that the said package of money passed to him under the said assignment with the other property of said Goldey, and that he holds the same in trust for all of the creditors of said Goldey.

The said plaintiff claims that said package of money did not pass to said assignee by said assignment, and that the same should be delivered to him (said plaintiff), in pursuance of the intention and request of said Goldey."

Churchill & Nutting, for the plaintiff, submitted with other points, the following:

The concealment by Goldey of his insolvency, and his intention already formed to make an assignment, which was consummated the same day, would have made it an act of fraud had he received the plaintiff's money, *with the intent to make it his own*.

The court will not now compel the party against his intention to be guilty of an act of fraud, which it would have been its duty to have set aside had it been done intentionally. Referring to *Gale v. Hoyt* (19 Barb., 249); *Mitchell v. Worden* (20 Barb., 253).

Albertus Perry, for the defendants, contended that the

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nature of the contract was determined by what was done at the time of the deposit, and could not be varied by any secret purpose of the depositor not indicated to the plaintiff.

That the character of the contract could not be affected by Goldey's subsequent action in relation to the money.

That the plaintiff intended to make a general deposit, and Goldey evinced an intention to so receive it.

That there being no agreement express or implied by which the identical money was to be kept for the depositor, the deposit was general, and created the relationship of debtor and creditor, citing *Commercial Bank of Albany v. Hughes* (17 Wend., 94); *Chapman v. White* (2 Seld., 412); *Payne v. Gardner* (29 N. Y., 146).

He also contended that even in view of Goldey's subsequent action, by the entry in his cash book for the purpose of making up his cash account, &c., the deposit was not received by him as a special deposit.

And insisted that Goldey being guilty of no fraud in receiving the deposit, was entitled to retain it as a general deposit, and that it passed to his assignee.

Present—MULLIN, MORGAN and DOOLITTLE, JJ.

By the Court—MULLIN, P. J. It is admitted in the case, that Goldey knew at the time of receiving the money from the plaintiff, that he was, and for several months had been insolvent, and that he had determined to assign his property to an assignee for the benefit of his creditors, within a day or two, unless he should receive assistance, which would enable him to continue his business.

Had he assigned the plaintiff's money on ascertaining that he would not obtain aid he would have been guilty of gross fraud upon the plaintiff. It would have been receiving property on credit not only, but with the intention not to repay it.

Had he purchased property of the plaintiff under such circumstances and then assigned it, the same, or the next day,

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for the benefit of all his creditors it would not be seriously contended that the transaction would not have been fraudulent. (*Buckley v. Artcher*, 21 Barb., 585; *Durell v. Haley*, 1 Paige, 492; *Ash v. Putnam*, 1 Hill, 302; *Acker v. Campbell*, 23 W., 372.)

I am of the opinion that the time had arrived in the affairs of Goldey when he was bound to disclose to his depositors that he was insolvent.

It was held in *Mitchell v. Worden* (20 Barb., 253), that a purchaser was bound to disclose to his vendor, with whom he had had dealings for a great length of time, that he had made an assignment of his property, and that the omission to do so was fraudulent.

While a person is carrying on business apparently solvent, yet in fact insolvent, he is not bound to disclose his pecuniary condition unless required to do so, and his concealment is not of itself fraudulent.

But may he continue to purchase property and be silent, knowing of his insolvency, until he has actually obtained the property of his vendor, and assigned it for the benefit of his creditors? It seems to me that good faith and the protection of those with whom such a man deals, require that the moment he becomes satisfied that an assignment must be made by him, he should disclose his condition.

It is perhaps right that in a country like ours where so much of the business is done upon credit, and by men who are in fact insolvent during a large part of the time they are in business, they should not be required to disclose their condition to those with whom they deal.

They desire to struggle on, and they may ultimately succeed and acquire a fortune. Disclosure of their real condition would be quite likely to destroy their credit and prevent them from further prosecuting business. The country cannot afford to be deprived of the enterprise and energy and perseverance of such men, and hence the wisdom of not imposing on them disclosure, as a duty which it would wish them to perform; but unless they may continue the concealment until they have

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not only obtained the property, knowing they cannot pay for it, but actually assigned and disposed of their entire means to pay their liabilities, the duty of disclosure must begin at a point of time when it will protect the seller, and that time is when the purchaser knows he can no longer continue business, and that his property must be applied to pay his debts.

A depositor in a bank is as much entitled to be informed of the condition of the banker with whom he deposits, and has the same claim for the practice toward him of good faith as has a vendor of property, each is entitled to the benefit of the same rules of law.

Goldey did not design to defraud the plaintiff and others, who deposited with him after half-past twelve P. M. of the 8th, September, 1869. Knowing his insolvency and inability to continue business, he kept the plaintiff's deposit separate from his own funds, marked it with the plaintiff's name in order to identify it, with the intention of returning it to plaintiff, should he, Goldey, be unable to continue his business. It is true, this purpose of Goldey was not disclosed to the plaintiff when he made the deposit. The money was handed to Goldey by the plaintiff, with the intention, on his part, of transferring the title to Goldey, and apparently the ordinary contract between a depositor and his depositary was made. The plaintiff had the right to insist upon this contract; but if it was true that Goldey had been guilty of a fraud upon him, in obtaining the deposit, it was competent for plaintiff, when informed of the fraud, to repudiate the contract and sue for his money. Goldey would have been guilty of fraud, had he taken it as a deposit and thus enabled himself to transfer the plaintiff's money to his assignees. This result he avoided by retaining the money, with the intention not to acquire title to it, but to retain it as the property of the plaintiff. The assignee of Goldey obtained no better title to the money than his assignors had, and as he had none the assignee acquired none.

If Goldey had fraudulently attempted to withhold the sums deposited on the afternoon of the 8th September, 1869, from

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the assignee, it is possible he might have held them. But Goldey never intended to pass those moneys to the assignee, unless there was some rule of law which took from him all discretion on the subject, and compelled him to pass them over to the assignee.

I know of no such rule of law. It follows if these views are correct, that the delivery to the assignee of the package of money, addressed to and to be delivered to the plaintiff, was a delivery to the plaintiff which revested in him the title to said money, and the defendant was and is the mere bailee of the plaintiff, on demand being made for the amount in said package.

I cannot perceive how this case is to be distinguished from that of *Ash v. Putnam* (1 Hill, 302).

In that case, one Dawmus, who was a member of the firm of A. Dawmus & Co., fraudulently purchased of the plaintiff, living in Philadelphia, Pa., a quantity of books on a credit of six months, and the books were shipped to the purchasers at Syracuse, their place of business.

The plaintiffs sent by mail an invoice of the books. Soon after the receipt of it, and before the seizure by the sheriff of Schenectady county, one of the firm of Dawmus & Co. wrote to the plaintiffs, informing them that the firm was insolvent, that the goods were somewhere between New York and Albany, and they were at plaintiffs' orders to dispose of as they pleased. The invoice was returned at plaintiff's request.

The defendant, as sheriff, seized and sold the books on a *fi fa*, against the purchasers, and this action was brought for the wrongful taking. The consent of the partner that plaintiffs might take the goods, was given in January, and the seizure by the sheriff was in March following.

It was held that the sale was rescinded, and the title to the books was in the plaintiffs, and hence that Dawmus & Co., the purchasers had not at the time of the levy any interest in the books which could be taken and sold on execution. The case of *Atkin v. Barwick* (1 Strange, 165), cited by Cowen, J.,

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in his opinion in the case of *Ash v. Putnam*, in principle, is identical with this case and governs it.

I am of opinion that there should be judgment in favor of the plaintiff, and against the defendant for eighty dollars, and interest thereon from the time of demand and refusal.

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CHARLES H. STEVENS, Respondent, v. MATILDA VERIANE and others, Appellants.

(GENERAL TERM, FIFTH DISTRICT, JANUARY, 1870.)

The provisions of section 885 of the Code, allowing an offer of judgment, &c., by the defendant to the plaintiff, are not applicable to equitable actions; *e. g.*, an action to foreclose a mortgage.

When the issues in an action of foreclosure are referred, the referee is charged with the duty of making a decision on the question of costs.

THIS action was brought to foreclose a mortgage given by the defendant, Matilda Veriane, to one Jewel, to secure to him a debt due from her husband. Before the action was brought the husband had made payments on the mortgage, and at the commencement of the action there remained due but ten dollars. Jewel assigned the mortgage to the plaintiff who was the holder and owner thereof.

The defendants appeared and put in answer, and afterward served an offer on the plaintiff's attorneys to allow judgment of foreclosure for twenty dollars.

The issues were referred, and the referee after hearing the proofs and allegations of the parties, found and reported that there was due and unpaid on the mortgage the sum of ten dollars; and ordered judgment that if within twenty days after service of a copy of the said report the defendants paid the sum of ten dollars and the fees and expenses of the reference, amounting to thirty-four dollars, they were entitled to have said mortgage delivered up and canceled, but if they omitted to make such payment, then the plaintiff was entitled to a judg-

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ment of foreclosure and sale of said premises to satisfy the balance due, and the fees of the reference, and the fees and expenses of making the sale and no more. No costs or disbursements except those specified were allowed either party.

The defendant moved, at Special Term, upon affidavits setting forth the foregoing facts, for costs subsequent to the offer made by them, and which had not been accepted by the plaintiff.

The motion was denied, and from that order the defendants appeal.

Mr. Southworth, for the appellants.

Messrs. Bedell & Bliss, for the respondents.

Present—MULLIN, MORGAN and DOOLITTLE, JJ.

By the Court—MULLIN, P. J. An action for the foreclosure and sale of mortgaged premises was under the former practice in this State an equitable action. Its nature is not changed by the Code of Procedure. It is, therefore, one of the class of actions in which costs are in the discretion of the court by section 306 of the Code. The disagreement between the parties is not as to the character of the action or the power of the court to award costs in its discretion, but it is as to the construction which should be given to section 385 of the Code. That section provides that "the defendant may at any time before trial or verdict serve on the plaintiff an offer in writing to allow judgment to be taken against him for the sum or property, or to the effect therein specified with costs." If plaintiff gives notice of acceptance within ten days the clerk may enter judgment according to the offer. If such notice be not given, the offer is to be deemed withdrawn and cannot be given in evidence, and if plaintiff fails to obtain a more favorable judgment he cannot recover costs, but must pay costs from the time of the offer. The offer was made and not accepted, and the plaintiff failed to obtain a more favor-

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able judgment. The defendants are therefore, clearly entitled to costs if section 385 applies to the case. In equity cases the judge determines the question of costs according to the justice of the case, and in view of all the facts and circumstances proved before him, one of the most important of these, to wit, the offer under section 385, cannot be properly proved before him; and hence, it is impossible for him to adjudge the rights to costs in view of that offer. Again, it would seem by the very terms of the section, that it was intended to apply only to cases in which the costs are given as of course to the party who moves in the action, as it provides that the offer shall be, that the plaintiff may enter judgment *with costs*.

It would be unjust to compel a defendant to allow the plaintiff costs, when his conduct may have been so oppressive, or unjust, or there was such a want of equity in his case, as that the court would refuse him costs in the event of giving judgment in his favor.

It is said that as the section enables the defendant to relieve himself from further costs and expense, by making the offer, and as there is no opportunity for the court to exercise its discretion, it is but reasonable that he should pay costs up to the offer, as it may be presumed that the court would, under the circumstances, award costs to the plaintiff. But the effect of such a construction is to take away from the court the discretion over all equitable actions in which an offer is made, and to substitute in its place an arbitrary regulation, while the court is bound to proceed to adjudge costs according to its own views of equity, without an opportunity to be informed of one of the most important circumstances affecting them.

This case is a perfect illustration of the consequences of the construction contended for. The referee was bound to determine who should pay costs, and if he did not mean to give full costs then it was his duty to fix the amount. He did what was his duty to do.

To alter the adjudication as to costs, upon motion, after judgment, is to vary the judgment, and this can only be done by a court authorized to revise the judgment on appeal or to

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review the cause. A judge at Special Term has no such power. (1 Barb. Ch. Pr., 376, 377.)

In legal actions, the court may, upon motion, amend the judgment record by increasing or lessening the amount of costs entered therein, or it may strike them out altogether; but it has never had such power over a judgment in an equity suit, and has not now, unless it obtains it under section 385, and it seems to me quite obvious that no such power was ever intended to be conferred on a judge at a Special Term.

It was held in *Pratt v. Ramsdell* (16 How., 60), that in foreclosure cases the plaintiff was not entitled to costs, as of course, that they were in the discretion of the court. That the provisions of the Revised Statutes, as to tender, do not apply to foreclosure cases; that the defendant may, however, tender the amount due, and as costs are usually allowed to the plaintiff in such cases, he should also tender costs, and then the court would, on the application of the parties, determine the question of costs; and if an extra allowance was desired (which can only be allowed after judgment), the court might permit the plaintiff to enter judgment for the sums tendered, and thus enable him, if otherwise entitled, to obtain the allowance. In this way the discretionary power of the courts in equity cases would be preserved. (*Bartow v. Cleveland*, 16 How., 364.)

It was and is competent for the defendant in an equity action to offer to the plaintiff the money, property or relief, which he concedes the plaintiff is entitled to, and this offer might very properly be considered in determining the question of costs, but it could not control the discretion of the judge. A tender under the Revised Statutes, and an offer under the Code, admit of no discretion; costs must be awarded in accordance with the provisions of the statutes.

The offer provided for by section 385 is but an enlargement of the provisions of the Revised Statutes relating to tender. (2 Statutes at Large, 574, § 20 to 24.) It may have been intended to embrace equity actions. The offer must be that the plaintiff may take judgment for the sum or property or to the effect

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therein specified. A sum of money is the relief sought in all actions for breaches of contract (when a specific performance is not demanded), and in all actions for injuries to person, property or character. Property is sought in replevin and in ejectment.

These are substantially all the common law actions that can be brought, and hence it would seem that the offer to take judgment "to the effect therein specified," must apply to equitable actions. It may, of course, be applied to proceedings by mandamus and *quo warranto*, and actions and proceedings of that nature, and I would feel constrained to hold that it applied to equitable actions, could it be applied consistently with the other provisions of the section, and not overturn the wise provision of the statute, that vests a discretion in the courts over the costs in that class of actions.

For these reasons I think the order of the Special Term should be affirmed with ten dollars costs.

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EBENEZER BENEDICT, Appellant, v. JOSIAH JOHNSON,
Respondent.

(ADJOURNED GENERAL TERM, FIFTH DISTRICT, DECEMBER, 1869.)

A verdict improperly influenced by misdirection of the judge, will be set aside on motion upon a case made, although no exception has been taken at the time of the charge.

APPEAL by the plaintiff from an order, made at Special Term, granting a new trial.

The plaintiff commenced an action of trespass *quare clausum fregit*, against the defendant, in a justice's court, charging him in his complaint with breaking and entering his close, which was described, and digging up the soil, building a post and board fence thereon, and cutting down the trees standing and growing thereon, &c.

The defendant pleaded title to the premises in question,

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and gave security; and the plaintiff thereupon commenced this action for the same trespass, to which the defendant again interposed the plea of title.

The cause was tried at a Circuit Court, held in the county of Lewis, before the court and a jury, and under the direction of the judge, a verdict was rendered in favor of the defendant, which was afterward set aside and a new trial granted for misdirection.

The action was again tried at a Circuit Court, held in that county, before the same justice and a jury, in April, 1868, and resulted in a verdict for the plaintiff. The defendant afterward moved, at a Special Term, for a new trial, on a case made, alleging as the grounds thereof, the misdirection of the judge to the jury, and also newly discovered evidence.

The court, at Special Term, granted the new trial, mainly because of misdirection to the jury, upon payment by the defendant of the costs of the former trial, and of opposing the motion, and from that order the plaintiff appeals.

George W. Smith, for the appellant.

A. J. Mereness, for the respondent.

Present—BACON, FOSTER and MORGAN, JJ.

By the Court—FOSTER, J. The parties owned adjoining farms, and it appeared by the evidence that more than thirty years ago, a crooked fence was constructed on or near the line between them, which was intended for a line fence. The general direction of the fence, which was about 100 rods in length, was pretty straight, but it had crooks at several points, at some of which it diverged on one side, and at others on the other, from a straight line.

There was much conflict in the testimony in regard to what was claimed by the respective parties to be the true corners at the extremities of the line between them, and as to where the true line was, according to their respective deeds. Those questions upon the evidence were left in much doubt, so that

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it was quite uncertain whether the acts of the defendant, which were complained of, were committed on the land of the plaintiff, or on his own premises; but there seemed to be no dispute that the post and board fence, built by the defendant in the fall of 1866, was constructed on the plaintiff's side of the old fence, as it was before the fence in question was made, and that some of the trees, which he at that time cut, were also standing on the plaintiff's side of the old fence.

The plaintiff endeavored to prove, and he insisted that the line between the two farms had become settled, as he claimed it was, by acquiescence for more than twenty years, while the defendant insisted and attempted to prove, that there had been no acquiescence in that line; and it appeared from the evidence that both parties had repeatedly, and during a series of years made alterations of the line of the old fence, when repairing or rebuilding it, and that they had also made repeated attempts by surveys, which they respectively caused to be made, to ascertain where the true line was.

In his charge to the jury, the judge, among other things said: "If the line claimed by the plaintiff is the true line, that would entitle him to a verdict. *He would also succeed if you are satisfied, there has been an acquiescence of twenty years in it as the true line*; or, he will succeed if you are satisfied the true line is where the fence was at the time the defendant undertook to remove it." A subsequent part of the charge conveyed quite distinctly to the jury, that the evidence had failed to satisfy him where the true line was. And it is quite probable from the whole case, that the verdict which was for the plaintiff, was influenced by that portion of the charge in regard to acquiescence.

There was no exception taken on the trial to any portion of the charge, and of course, no exception to it will now avail the defendant.

And the question is, should a verdict be set aside on a case made for a misdirection of the judge, which improperly influenced the verdict, where no exception is taken at the time.

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The authorities to establish that it should be are very numerous, of which I shall cite only *Archer v. Hubbell* (4 Wendell, 514); *Harris v. Wilson* (1 Wendell, 511); *Wardell v. Hughes* (3 Wendell, 418); *Highland Bank v. Wynkoop* (Hill & Denio, *supra*, 243).

I have carefully read and examined the case made, and I think the evidence was such as to preclude the conclusion, that either party had acquiesced for twenty years in the old fence as the true line between them; that the charge in that respect was erroneous, that it probably influenced the verdict of the jury.

That the court below was right in granting a new trial upon the terms which were imposed; and the order should be affirmed with costs, including costs of this appeal, to abide the event. (*Kennedy v. The Harlem Railroad Company*, 3 Duer, 659.)

MORGAN, J., concurred.

BACON, J., dissented; new trial ordered.

GEORGE COLGROVE, Respondent, v. CHARLES TALLMAN,
Appellant, impleaded with HENRY C. BARNES.

(GENERAL TERM, FIFTH DISTRICT, DECEMBER, 1869.)

In June, 1864, T. sold out his interest in the firm of B. & T. to B., who assumed payment of the firm debts; C., the holder of a firm note, was duly notified of the dissolution and assumption, and was requested by T. to collect the note at once; payments on the note were made by B., and when, in June, 1865, C. formally demanded payment in full, for the purpose as he said, of investing in United States bonds, B., who held bonds more than sufficient to balance the note, offered to give C. instead of money, a receipt for an equal amount of bonds; the balance due on the note and its equivalent in bonds, were adjusted between them, and B. gave C. a receipt, stating that he had received from C. the bonds, to be held by him for safe keeping, and to be returned to C. on surrender of receipt, which was duly stamped and delivered; the note was not, in fact, surrendered by C., and the bonds remained in possession of B. who

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made a further payment on the note, and in July, 1866, made a general assignment for the benefit of creditors; C. then demanded possession of the bonds, but did not get them, and subsequently, for the first time, demanded payment of the note from T., and on refusal sued B. & T. on the note; B. had told T. that the note was paid, but on the trial before a referee there was a conflict as to whether C. had promised to surrender the note and hold the receipt in its stead. On appeal by T. from a judgment for the plaintiff.—*Held*, reversing the referee's finding of fact, that the receipt for the stock was taken in payment of the note, and the judgment against the appellant could not be sustained.

After notice has been given to a firm creditor by each of the partners, that one of them has withdrawn, and that the other will continue the business, and has agreed to pay individually the firm debts, transactions between the creditor and continuing partner must be considered with a reference to the new relations of principal and surety existing between the late partners, in determining the question whether any such transaction amounts in favor of the retired partner to a payment of the firm debt.

APPEAL from a judgment in favor of the plaintiff, on the report of a referee.

Previous to, and on the 3d day of October, 1863, the defendants were copartners and doing business as liquor merchants in Syracuse, under the firm name of H. C. Barnes & Co., and on that day as such copartners, executed to the plaintiff, in their firm name, their promissory note for \$2,000 payable to him or his order at their office, "fifteen days demand after date."

Afterward and about the 21st day of June, 1864, the defendant, Tallman, sold out his interest in the copartnership to the defendant, Barnes. The copartnership was dissolved, and Barnes assumed and agreed to pay the firm debts and liabilities. Barnes continued the business until July, 1866, when he failed, and made a general assignment for the benefit of his creditors, with preferences to some of them.

Soon after the dissolution of the copartnership in 1864, the plaintiff was notified thereof, and that Barnes had assumed and was to pay this debt, and he was requested by Tallman to collect the note at once; and after that Barnes, on the 17th day of April, 1865, paid the plaintiff the sum of \$214.30, and on the 26th of June, 1865, the sum of \$400, to

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be applied toward the payment of the note, and they were indorsed thereon by the plaintiff.

On, or immediately after the 25th of June, 1865, Colgrove demanded payment of the note from Barnes, for the purpose, as he stated, of investing the proceeds in government bonds, in order to exempt that amount of his personal estate from taxation. Barnes then held and owned a larger amount than that of government bonds. They estimated the amount due on the note, and Barnes proposed to give Colgrove a receipt for \$1,600 of government bonds which were then worth as much as the balance due on the note, instead of paying him the money; to which Colgrove assented. And Barnes then executed to Colgrove a receipt, dated back, and which was as follows:

“SYRACUSE, *May 30th*, 1865.

“Received of George Colgrove, sixteen hundred dollars of U. S. 7-30 notes, which are held by me for safe keeping, and to be returned to him at any time on surrender of this receipt (stamp two cents.)

“(Signed)

HENRY CLAY BARNES.”

But the note was not then surrendered to Barnes. At that time Barnes was good and responsible, and subsequent thereto, no demand for payment of the note was made by Colgrove upon Tallman, until after the failure of Barnes, which occurred in the month of July, 1866. And after, or about the time that Barnes failed, a demand was made on behalf of Colgrove upon Barnes for the 7-30 notes, which was not complied with and after that Colgrove demanded of Barnes, the payment of the note in question.

Barnes and Colgrove both testified to this transaction, and the only material conflict between them was, that Barnes testified, that at the time the receipt was given, Colgrove agreed to send him the note, which statement Colgrove denied. Soon after the execution to Colgrove of the receipt for the 7-30 notes, Barnes informed Tallman that he had paid the note, and no claim was made upon him for it, until some time after Barnes failed. The demand made by the plaintiff

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on Barnes on or about the 25th day of June, 1865, was such as to mature the note in fifteen days thereafter, unless it was sooner paid.

On the 24th day of March, 1866, Barnes paid the plaintiff \$421.19, which was indorsed on the note, and after the general assignment of Barnes, which was made in July, 1866, his assignees paid the plaintiff \$325 on the 30th day of July, 1866; and \$130 on the 22d of August, 1866, which were indorsed by the plaintiff on the note.

The referee found that the receipt for the United States notes was not taken in payment of the note in question; that as between the plaintiff and Tallman, the latter was not at any time a surety for Barnes in regard to this debt; and, he also found as a matter of fact, that the letter of Tallman to Colgrove, notifying him that Barnes was to pay the debt, and requesting him to collect it at once, was not received by Colgrove until after Barnes failed. And he found and reported in favor of the plaintiff against both defendants, for the sum of \$1,060.87, upon which judgment was entered, and which was for \$30.47 more than the plaintiff was in any event entitled to recover.

The defendant, Tallman, appealed to this court.

D. Pratt, for the appellant.

Charles Stevens, for the respondent.

Present—BACON, FOSTER and MULLEN, JJ.

By the Court—FOSTER, J. There is no question, but that the report and judgment were erroneous in amount, and that they include \$30.47 to which the plaintiff was not entitled; but the judgment should not be reversed and a new trial granted for that reason alone, if the plaintiff stipulates to deduct that amount from the judgment.

There is quite as little doubt upon the evidence, that the finding of fact, that the letter of Tallman to Colgrove informing him that Barnes was to pay the note and requesting him

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to collect it at once, was received by Colgrove after the failure of Barnes was erroneous. There is no evidence to support the finding. Tallman testifies that the letter was sent in 1864, and even when examined in chief, Colgrove testified: "My impressions are very indistinct of that letter, but I should say that I received it *before* Barnes' failure, if at all." And, on his cross-examination, he said: "I have an indistinct impression I received a letter from Tallman; I cannot say I did or did not; I cannot pretend to state contents, having an indistinct impression; I have made search for it; I have no definite recollection as to the time when I received it."

It was also received by him before the time when Barnes executed the receipts for the 7-30s, and doubtless in the year 1864, for such is the testimony of Tallman, and while Colgrove thinks he received the letter, does not contradict Tallman, either as to the time he received it, or as to its contents; stating in substance that he cannot speak as to either, because his recollection in regard to it is so indistinct.

From the times when Barnes informed Colgrove that he was to pay the note, and Tallman sent him the above mentioned letter, as between Colgrove and him, he was the surety of Barnes to the same extent, as he was so, as between himself and Barnes. And the rule is the same whether he became so after the making of the note from the time the plaintiff had notice of it, as it would have been if Tallman had originally been surety for Barnes, and that fact was made known to Colgrove.

This is not, however, of any importance so far as any extension of credit to Barnes is concerned. For the case does not show any agreement on the part of the plaintiff to give time to Barnes for payment of the note; but only upon the question, whether as to Tallman the transaction between Barnes and Colgrove was or was not a payment.

Colgrove went to Barnes after he knew from both of the defendants that Barnes alone was to pay the note. He demanded of him the payment for the purpose of investing the amount in government securities, so as to be exempt from

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taxation to that amount. He does not claim that he took the receipt as collateral to the note, but he insists that he took it entirely independent of, and as having no connection with the note. Now, why did he so take it? If taken as he claims, it was without any consideration whatever; it was not legal evidence that he held any 7-30 notes in the hands of Barnes. He could not use it for the purpose of reducing his assessment. It was no better in his hands than waste paper, and any affidavit or oath of his founded thereon, for the purpose of getting rid of taxation would have been perjury on his part. And why did he not then insist upon the payment of the note in money, so that he could make the investment which he desired to make.

Upon his theory, all that took place between him and Barnes on that occasion, was not only a useless and idle ceremony, but too foolish for business men to be engaged in. But if it was what he claims it to be, why did he immediately, after Barnes' failure, call for the delivery of the 7-30 notes. He must have known that he had no claim on Barnes for such notes; that the receipt was entirely void for want of consideration; that the execution and delivery of it to him was only a farce, and yet he sends his lawyer to demand it upon the receipt as his own, and during all the intervening time, he had not in any way claimed that Tallman owed him anything. All this is too incredible to be believed, when opposed by the direct testimony of Barnes, that the title to the United States notes really passed from him to Colgrove, and that he thereafter held them for Colgrove, and to be delivered to him when he should produce the receipt; and when the story of Barnes is so supported by the subsequent acts of the plaintiff. He knew that Tallman was surety. He entered into a transaction with Barnes, by which the absolute title to the government notes passed to him, and passed to him in lieu of what he had then demanded—payment of the note in question; and Barnes immediately thereafter informed Tallman of what had been done, and that he had paid the note; and I think upon all the evidence in the case, he was

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estopped from afterward claiming that the note in question was not paid. He well knew that the 7-30s were good, and Barnes being in good standing, he was willing to take from him the evidence that they were transferred to him, and intrust him with the possession of them; and he doubtless thought he could rely upon Barnes to have them forthcoming when he should demand them. And he evidently did so. And whether such arrangement was afterward changed between him and Barnes is wholly immaterial to Tallman. It is enough for him that by the transaction, when the receipt was given, the 7-30s were taken instead of the note.

It would lead to manifest injustice, if such a transaction as the one in question were not held to estop the plaintiff from claiming that the note was not paid. It is a question of evidence upon the fact, whether the note was paid or not, and I think the finding was in conflict with the evidence, which well established that the receipt for the stock was taken in payment and discharge of the note.

A new trial should be granted, with costs to abide the event, and the order of reference should be discharged.

All concurring. New trial ordered and order of reference vacated.

CHARLES A. MERRICK, Appellant, v. EBEN BUTLER, Executor,
&c., of NARCISSA VOORHEES, deceased, Respondent.

(GENERAL TERM, FIFTH DISTRICT, DECEMBER, 1869.)

In an action upon a promissory note, brought by one who has taken it for value, but after maturity, the maker may defend, upon the ground that the note was given, solely as protection against a mortgage executed and delivered to him by the payee to prevent a collection out of the mortgaged property of penalties incurred by the violation of law.

It is also a sufficient defence to the suit if while the note was in the hands of the payee, the maker, without consideration, acknowledged satisfaction of the mortgage.

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APPEAL from a judgment for the defendant on the report of a referee, who was appointed by the stipulation of the parties, with the approval of the surrogate, pursuant to the statute, and filed in the office of a clerk of this court.

The claim was tried before the referee who found as matters of fact, that Narcissa Voorhees, in her lifetime and on the 22d of February, 1864, executed to one John Hutchinson, who was her brother, her promissory note in writing, by which on the 1st day of April then next, she promised to pay to him or bearer, \$289.63, with interest for value received.

That after her decease, and after the note became due, and before the commencement of these proceedings, Hutchinson for a valuable consideration, sold and transferred the note to the plaintiff, who has since owned the same, and that no part thereof has been paid. That the only consideration for the note was, that some years previous to its execution, Hutchinson, who was then engaged in merchandising, and who was being troubled on account of intoxicating liquors, sold or alleged to have been sold by him, and for the purpose of covering up his real estate from being charged with any penalties, or liabilities on account of such sales, executed to her a mortgage on his said real estate, and that at the same time, she executed to him a promissory note for an amount equal to the mortgage, for the purpose of protecting him against it. That when said note was nearly barred by the statute of limitations, the note in question was given by her, it being for the amount of the original note with its interest, and the original note was taken up by her; that the mortgage was executed solely for the purpose aforesaid, and the note in question was given only in lieu of the prior one; that no money was ever paid on the mortgage or received by Mrs. Voorhees thereon, or on account of the note, and that when the mortgage was satisfied by her, there remained no further consideration for this note. And as matter of law, he found that the plaintiff could not recover and ordered judgment for the defendant with costs, which was entered, and from which the plaintiff appealed.

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H. L. Green, for the appellant.

E. Butler, for the respondent.

Present—BACON, FOSTER and MULLIN, JJ.

By the Court—FOSTER, J. The testimony fully justified the finding of fact in this case ; and the question is, was Narcissa Voorhees, liable in her lifetime on the note ; and especially, was she so liable after she acknowledged satisfaction of the mortgage which Hutchinson executed to her.

The plaintiff purchased the note long after it became due, and after the death of the maker, and he was not therefore a *bona fide* holder for value, and had no greater rights as its holder, than Hutchinson had, while the note was owned by him.

The case of *Nellis v. Clark*, in error (4 Hill, 424), is conclusive on the point, that in an action on a promissory note brought by one not entitled to be treated as a *bona fide* holder, the maker may defend on the ground, that the note was given in consideration of land sold for the purpose of defrauding creditors, and this though, he himself was a party to the fraud ; and, of course, the rule is the same, where the note was given in consideration of a mortgage upon the property where the purpose was the same.

Again, while Hutchinson was the holder of the note, Narcissa Voorhees acknowledged satisfaction of the mortgage without consideration therefor, and therefore, independent of the question of fraud, he had no valid claim against her on the note, and the debt created thereby was extinguished, and the plaintiff who purchased it afterward, and after it was due took it subject to each of the above defences.

The judgment should be affirmed.

All concurring. Judgment affirmed.

Hiscock v. Phelps.

FRANK HISCOCK, Executor, etc., of JACOB M. COOK, deceased, Respondent, v. GEORGE W. PHELPS, Appellant, impleaded with CHARLES J. KENYON, and MARIA, his wife, PETER MUMFORD, and MARY, his wife, JNO. P. SHUMWAY, and HARRIET, his wife, and JNO. S. KENYON.

(GENERAL TERM, FIFTH DISTRICT, DECEMBER, 1869.)

Every party to an action, whether as plaintiff or defendant, who has an interest in sustaining a judgment or determination appealed from, is an "adverse party" within section 827 of the Code, and, as such, is entitled to notice of appeal.

The several members of a firm secured certain partnership debts and liabilities by two consecutive mortgages on real estate, which stood in their names, as tenants in common, and which had been purchased and was used by them for partnership purposes. Intermediate the making of these two mortgages one of the partners executed a mortgage on his interest in the same premises, to secure an individual indebtedness contracted partly for the purpose of raising money to make up his share of the partnership capital, and partly for other purposes. The firm, as such, became insolvent; the partner executing the individual mortgage had not contributed his full share to the firm capital, and was personally insolvent; the other members had contributed their full share, and were personally solvent. The holder of the two first mentioned mortgages commenced a foreclosure, claiming for the second of them a priority over the individual mortgage, although the latter was prior in time. The solvent partners answered, and also claimed that the two mortgages, executed by all the partners were entitled to be first satisfied, and that the individual mortgage was a lien on only one-fourth (the insolvent partner's interest) in the surplus. The insolvent did not appear, but the holder of the mortgage, made by him, claimed that his mortgage was a valid lien as of the time of its execution, and judgment having gone against him, after a trial, he appealed, but did not give notice of appeal to the partners who had answered, and in substantial accordance with whose answer judgment had been entered.—*Held*, that the partners answering had an interest adverse to the appellant in sustaining the judgment, and were necessary parties to the appeal; that in case the judgment should be reversed, the parties not before the court would not be bound by the reversal, and plaintiff's right might be prejudiced thereby, and he had, therefore, a right to take the objection; and that it was too late to make the other defendants parties, and the appeal should be dismissed.

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APPEAL on the part of George W. Phelps from a judgment entered on the report of a referee.

The action was brought to foreclose a mortgage upon the lands and premises described in the complaint, executed to Jacob M. Cook, by the defendants, Charles G. Kenyon, Peter Mumford, John P. Shumway, and John S. Kenyon, bearing date the 11th day of May, 1866, described in the first count of the complaint. And also to foreclose a mortgage executed to Cook by the same defendants upon the same premises, and bearing date the 29th day of February, 1868, described in the second count.

George W. Phelps was made a defendant in the action, as holder of a mortgage, upon an undivided one-fourth of the said premises, to secure the sum of \$3,500, executed to him by the defendant, John P. Shumway, and bearing date October 1, 1867; and the plaintiff claimed that the second mortgage to Cook should be declared an incumbrance on the whole of the said premises, in preference to the mortgage of Phelps, and that both of Cook's mortgages should be paid out of the avails of the mortgaged premises, in preference to the mortgage of Phelps.

Phelps appeared by his attorneys and answered separately; setting up his mortgage as valid and subsisting, and as a prior incumbrance to the second mortgage executed to Cook.

Charles G. Kenyon, Peter Mumford, and John S. Kenyon appeared by another attorney, and answered, and in their answer claimed, not only that the second mortgage executed to Cook should be preferred to the mortgage held by Phelps, but that Phelps' mortgage was equitably only a lien and incumbrance upon one-fourth part of any residue, which might remain after paying the mortgages executed to Cook, a mortgage on the same premises, executed by Peter Mumford, John P. Shumway and John S. Kenyon, to Charles G. Kenyon, and the liquidation of the partnership affairs of the said Charles G. Kenyon, Peter Mumford, John P. Shumway and John S. Kenyon. John P. Shumway did not appear.

The issues in the action were tried before a referee, and the

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pleadings authorized the proofs which were given, and the facts found by him, and the proofs also supported the findings of fact which he reported.

He found that on or prior to the 11th day of May, 1866, the premises described in the several mortgages mentioned in the pleadings were owned by Jacob M. Cook and Charles G. Kenyon, and had been occupied by them as a distillery, Jacob M. Cook being seized in fee of the one equal undivided third part thereof and Charles G. Kenyon of the undivided two-thirds thereof.

The defendants, Charles G. Kenyon, John S. Kenyon, his son, John P. Shumway and Peter Mumford, prior to the 11th day of May, 1866, agreed by parol to purchase said real estate and put it into a paper mill manufactory, and run and occupy the same as copartners, under the name, style and firm of Charles G. Kenyon & Co., each to contribute \$4,000, of which \$10,000 was to be invested in the purchase of the real estate, and the balance to be used to improve the same and put in the necessary machinery for engaging in the business of manufacturing paper.

In order to carry out such agreement the copartners purchased out Jacob M. Cook's interest in said real estate for the sum of \$3,333.33. Cook and his wife, on the 11th of May, 1866, executed to the said copartners a deed of his interest in the premises, in their individual names, as tenants in common, and they in their individual names, on the same day, and to secure to him the purchase price, executed to him their mortgage, to secure the said sum of \$3,333.33, together with their bond for the payment of the same, which mortgage was acknowledged and duly recorded on the 11th day of January, 1867.

In order to carry out the said agreement Charles G. Kenyon, on the said 11th day of May, 1866, together with his wife, conveyed by warranty deed to John S. Kenyon, John P. Shumway and Peter Mumford an equal undivided half of the said premises for the price and consideration of \$6,666.67, of which Charles G. Kenyon donated to his son, John S.

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Kenyon, the sum of \$4,000 and for his contribution of \$4,000, to make up the capital sum of \$61,000 which the parties agreed to contribute and invest in the copartnership business.

The balance of the consideration, \$2,266.67, was secured to be paid to Charles G. Kenyon by the bond and mortgage of John S. Kenyon, John P. Shumway and Peter Mumford, which remained wholly due and unpaid, and a lien on the premises, and was acknowledged and duly recorded May 14, 1866.

The copartners immediately entered into the possession of the real estate as copartners, and improved the same by the expenditure of large sums of money for such purpose, and to put in the necessary machinery for manufacturing paper, and moneys were borrowed in the name of the firm for that purpose, and books kept in the name of the firm, showing the same, and the necessary expenditures for improvements, and the expense of procuring the necessary machinery, and the firm commenced to manufacture paper and sell the same as early as January, 1867.

In the course of the year 1867, the firm, in the firm name, borrowed money of Jacob M. Cook to improve said premises, and convert the same into a manufactory of paper, with an understanding that the same was to be secured by a mortgage upon the premises. The fact that money was borrowed of him, on account of the copartnership, appeared by the books kept in the office of the company, to which all parties had access, and must have come to the knowledge of all of the partners.

These loans from Cook to the company began as early as August 8th, 1867, and continued to November 5th, 1867, and on the latter day amounted, with interest, to the sum of \$8,496.43.

Cook then agreed to loan them a further sum, upon the same understanding, and, on the 29th day of February, Charles G. Kenyon, John S. Kenyon, Peter Mumford and John P. Shumway executed their mortgage upon the whole of said premises to secure to him the payment of the sum of

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\$16,772.30, together with their bond executed to him accompanying the mortgage to secure the said sum, which mortgage was acknowledged and duly recorded on the 4th day of March, 1868; Cook having assumed, and taken up and paid, and assumed to pay the further sum of \$8,496.43, then due from the said copartnership to the First National Bank of Baldwinsville, and for which the bank had held the paper of the firm, given for loans to raise money to be expended in improvements upon the premises, and which had been running a year or more, and renewed from time to time.

The copartners, in the course of the summer, fall and winter of 1867, and up to the time of giving the second mortgage to Cook, contributed to the purchase of the said real estate, improvements and machinery, &c., as follows: Peter Mumford, the sum of \$4,400.37; John P. Shumway, the sum of \$3,834.14; Charles G. Kenyon, in advances, \$11,931.47, and in real estate, \$2,500; and John S. Kenyon, by donation of his father's, in real estate, \$4,000.

In addition to these sums the firm had borrowed the sum of about \$16,000, which was applied to improve the premises and establish the paper manufactory thereon.

What the company had not borrowed of Jacob M. Cook at that time, they had before that time borrowed of the First National Bank of Baldwinsville, in anticipation of a loan from Cook, and which he offered and assumed to pay, and did pay at the time he took the second mortgage, and the true sum which the company owed him at the time of the execution of the mortgage is stated in the same.

It did not appear by the evidence, what were the true sums severally contributed by the several partners, which remained unpaid and unsatisfied, although it did appear that Charles G. Kenyon was largely in advance of the others, and that upon the dissolution of the firm, on the settlement of the copartnership debts, the company would owe him several thousand dollars, to be paid out of the partnership property, and effects before anything could be divided among the partners. It was also proved and found that the copartner-

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ship was insolvent, and that there was not property enough, including the real estate, to pay the copartnership debts, and that upon a settlement of the copartnership debts, nothing would remain to be distributed to the copartners.

It was also found that the mortgage of John P. Shumway to the defendant, George W. Phelps, was made and executed on the day it bears date (October 1st, 1867), to secure the individual debt of Shumway to Phelps, to the amount of \$2,450, made up as follows :

June 1st, 1867, Phelps loaned to Shumway the sum of \$1,000 ; April 1st, 1867, the sum of \$450, and a prior indebtedness to Phelps and Mrs. Shumway of \$1,000.

When he applied to Phelps for the first two loans, he informed him that he wanted the money to aid him in paying up his proportion of the moneys he had agreed to advance toward the purchase of the property in question and improvements thereon, and told him who were the members of the firm of Charles G. Kenyon & Co., and who owned the property.

On the first day of October, 1867, Shumway applied to Phelps for more money, and he declined to advance him more without security, and Shumway then proposed to give him a mortgage on his interest in the real estate, occupied at the time by the firm of Charles G. Kenyon & Co., for a paper manufactory, and known to Phelps to be in the actual occupation of said firm at the time. Phelps also required Shumway to secure by the same mortgage, what he owed his mother, a widow woman (the sister of Phelps), for provisions and money had of her by Shumway, including a small sum which he owed Phelps for provisions, &c., and the same was then agreed upon to amount to the sum of \$1,000, as above stated (and was included in the \$3,500) ; although no books were furnished, or accounts produced to show what was the true amount ; but the same was arrived at by estimates, made at the time, and which are not shown to be incorrect in any material particulars.

Phelps then not having any more money to advance at the

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time, proposed to take a mortgage for the sum of \$3,500 to secure the aforesaid sums, amounting to about \$2,500, and for any future advance which he might make not exceeding the face of said mortgage.

On the same day (the 1st day of October, 1867), Shumway with his wife executed the said mortgage, and acknowledged the same before Fred. A. Marvin, notary public; but the certificate of acknowledgment stated that the parties appeared before him and made said acknowledgment on the 1st day of October, 1866.

On the 30th day of December, 1867, the mortgage was delivered to the clerk of Onondaga county at his office, in Syracuse, for record, and was with him recorded that day in Book of Mortgages, No. 124, page 142.

Jacob M. Cook, when he received his mortgage, had no actual knowledge or information of the mortgage from Shumway to Phelps. It did not appear by the evidence what advances the several partners had made on the said 1st day of October, 1867; but it appeared that since then one-half of the debts against said Company, including advances by the parties, were incurred at that time by said copartnership for the improvement of the said premises and the purchase of machinery.

It was found that there was due upon the first mortgage, executed to Cook of principal, the sum of \$3,333.33, with interest thereon to date of the report \$745.16, making a total of \$4,078.49. That there was due on the second mortgage executed to Cook of principal the sum of \$16,772.30, with interest thereon to the date of the report \$1,699.73; making of principal and interest the sum of \$18,472.03.

That there was due on the mortgage executed by John S. Kenyon, John P. Shumway and Peter Mumford to Charles G. Kenyon of principal the sum of \$2,666.67 and interest to date of report \$596.26, making in all the sum of \$3,262.93.

That there was due upon the mortgage executed by John P. Shumway and wife to George W. Phelps the principal

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sum of \$2,450, together with interest thereon to date of the report.

The referee also found that the amount of the bond executed to Cook, accompanying his said second mortgage, could be collected of the mortgagors, who were solvent, except Shumway.

That the deed from Charles G. Kenyon to John S. Kenyon, John P. Shumway and Peter Mumford was to them in their individual names, and not in their copartnership name, for an undivided one-half of said premises.

That the defendant Phelps, at the time of taking his mortgage, had no personal knowledge that money had been borrowed of Cook by the firm of Charles G. Kenyon & Co., or that a mortgage was to be given him to secure the same. That at the date of the Phelps mortgage, October 1, 1867, Cook had only advanced to the firm as follows: August 8, 1867, \$400; September 21, 1867, \$700, against which there was a credit of thirty dollars.

That the \$1,450 borrowed by Shumway of Phelps was for the purpose of, and was used by Shumway to pay toward his share of the \$16,000 capital stock.

The referee reported that the mortgaged premises were so situated that they could not be sold in parts, and held that the plaintiff was entitled to a foreclosure and sale of the premises for the payment of his two mortgages, described in the first and second counts of his complaint.

That said premises were in equity to be treated and regarded as copartnership property.

That George W. Phelps was not a *bona fide* mortgagee, so as to give him priority of claim to the legal interest of John P. Shumway in the real estate, as against the plaintiff in this action, in respect to the mortgage described in the second count of his complaint, he having taken said mortgage against Shumway with notice that said premises had been purchased for copartnership purposes, and were improved and used by them for said purposes, and for the reason that said mortgage was given to secure *prior* indebtedness; and he further held and

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decided that Cook, the mortgagee in the mortgage described in the second count of the plaintiff's complaint, having no actual notice of the mortgage from Shumway to Phelps when he took the same, was not affected by constructive notice of the mortgage to Phelps, by reason of the defective certificate of acknowledgment.

And he directed judgment declaring the mortgage described in the second count of the plaintiff's complaint, a lien on the said premises prior to the lien of the mortgage from Shumway to Phelps, reserving the right of Phelps to establish his mortgage as a lien upon the surplus money if any should remain after payment of the plaintiff's two mortgages, and the said mortgage executed by John P. Shumway, John S. Kenyon and Peter Mumford to Charles G. Kenyon, and the costs and expenses of this suit, and the sheriff's fees, and expenses in foreclosure and sale of the mortgaged premises, reserving all questions as to claims upon such surplus. He directed the sale to be made in the usual manner, and after deducting expenses, &c., he directed the proceeds to be applied :

1st. To the payment of the first mortgage to Cook, described in the first count.

2d. To the payment of the said mortgage held by Charles G. Kenyon.

3d. The balance, if any, to the payment of the whole amount of the second mortgage executed to said Cook, described in the said second count of the complaint. And he ordered judgment also in case of deficiency, against the mortgagors, who are personally liable for the same, in the usual form.

Judgment was entered pursuant to the report.

The defendant, Phelps, appealed to the General Term "from that part of the decree and judgment, which decreed that plaintiff's mortgage described in the second count of his complaint have priority over defendant's mortgage mentioned in said complaint, and to the direction that it be first paid out of the proceeds of the sale of the mortgaged property ; and from all and every part of said decree and judgment,

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affecting the defendant's right to have payment of his mortgage, out of the one-quarter proceeds of the mortgaged premises prior to plaintiff's said mortgage." And the notice of such appeal was served on the county clerk, and on the attorneys for the plaintiff, but was not served upon the attorney of either the said Charles G. Kenyon, Peter Mumford or John S. Kenyon.

J. C. Hunt, for the appellant.

Frank Hiscock, for the respondent.

Present—BACON, FOSTER, MULLIN and MORGAN, JJ.

By the Court—FOSTER, J. I have examined with some care, the questions arising on the merits on this appeal, and have come to the conclusion, that the report of the referee, and judgment entered thereon were correct.

I have no doubt upon the facts proved, that from the 11th day of May, 1866, when the deeds of Cook and of Charles G. Kenyon were executed to the parties composing the firm of Charles G. Kenyon & Co., for the purposes of, and to be used for the copartnership business, and to be paid for out of the joint fund, which the copartners were to contribute toward its capital, that in equity, the property conveyed became, and should be regarded and treated as copartnership property, and that erections and improvements made upon the said real estate, thereafter, for the use of the partnership, belonged to the copartners as such. And that all debts created by them for any of such purposes, would constitute an equitable claim and lien thereon, superior to any legal lien or incumbrance, which either of the copartners could place thereon in his own name, for his own individual debt.

The main question is, whether the mortgage of Cook for the \$16,772.30, should have priority over the mortgage of the defendant, Phelps, executed on the first of the preceding October.

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There is no dispute, but that Phelps knew, when he loaned the first money to Shumway, that the loan was to him individually, and to enable him to pay into the firm his share of its capital, or that the copartnership was existing, or that the copartnership were in the actual occupation of the premises as such, and were using it for their copartnership business.

Nor is there any doubt that nearly or quite all the amount included in that Cook mortgage was due from the firm to Cook and to the National Bank before the mortgage to Phelps was executed, and was then entitled to priority upon the whole partnership property as against the loan made by Phelps to Shumway, and therefore irrespective of the question whether the mortgage to Phelps was so acknowledged as to entitle it to be recorded and to constitute it notice to all others, I think Cook had a right, at the request of the copartners, to assume and pay such prior indebtedness to others, and succeed to all their equitable rights, as against the Phelps' claim, and that a mortgage taken by him as security therefor was entitled to priority over the mortgage of Phelps, even though it had been properly acknowledged and recorded.

If I thought the result of this appeal could be made to depend upon these questions, I should examine them much more elaborately than I have done, and should endeavor to analyze the authorities bearing on the questions; but we are met with the objection on the part of the plaintiff that this appeal is not properly brought by Phelps; that the proper and necessary parties for the determination of it have not been served with notice of the appeal and are not before us, and that we cannot determine the appeal, or at least we cannot reverse the judgment without making Charles G. Kenyon, Peter Mumford and John S. Kenyon parties to it, and the conclusions to which I have arrived on this question relieve me from such further examination of the merits of the case.

These three defendants appeared by their own separate attorney and put in their separate answer, and alleged the copartnership, the purchase of the real estate in question as

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partnership property, the payment for it so far as it had been made, and for the improvement of it with copartnership funds; that for such payments the copartners had made unequal advancements; that C. G. Kenyon had advanced \$12,000, John S. Kenyon \$4,000, Peter Mumford \$4,500, and John P. Shumway \$3,800; that such advancements had been mainly before, and all of them without any knowledge of the Phelps mortgage, and made upon the faith and belief that the property was chargeable with the payment of partnership debts and the equalization of advances made by the several copartners before they could be charged with individual debts by mortgage or otherwise; that the mortgage to Phelps was received by him, with full knowledge of the facts, and that they had no knowledge of Phelps' mortgage, and they claimed that the said second mortgage of Cook should have priority over that of Phelps, and also that Phelps' mortgage should be adjudged only a lien on such interest, in the land or its proceeds, as Shumway would have after payment of both of Cook's mortgages, the mortgage to Charles G. Kenyon, the costs of the foreclosure suit, and the equalizing of the said advances.

Now, if the decree in this case is sustained, it is quite clear, provided the real estate is worth enough to pay the two Cook mortgages, and the mortgage to Charles G. Kenyon, that these three defendants will be absolved from all liability, on that part of the decree, which holds them liable on the bond for any deficiency, or they will remain liable only for such deficiency thereon, as may remain after exhausting the whole real estate toward their discharge; and, in case there is a surplus after paying the three mortgages to Cook and Kenyon, the question whether their equitable rights as copartners, to an equalization is, or is not, to be preferred to the claim of Phelps under his mortgage, remains open and to be determined in the ordinary way.

On the contrary, if upon the merits, we should decide that the Phelps mortgage has priority over the second mortgage of Cook, and if there should be a deficiency, arising from the

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sale of the premises, in discharging the costs and paying the four mortgages, these defendants would be liable on their bond, under the decree, to a greater amount than they now are, equal to the whole amount found to be due on Phelps' mortgage; and even if the fund were sufficient to discharge all the mortgages, they would be foreclosed from setting up their equitable claims as copartners in preference to it. They are, indeed, the only persons who have a real pecuniary interest in sustaining this decree, for they are the only obligors who are responsible, and, being entirely able to pay, as the findings in the case show, it is not very important to the plaintiff that he succeed in obtaining the preference for his second mortgage; for all deficiency arising from the sale of the real estate, must be made up by these three defendants, provided the question be so determined, as not to discharge their personal liability.

The Code (section 327) provides that: "An appeal must be made by the service of a notice in writing on the adverse party, and on the clerk with whom the judgment, or order, appealed from is entered; stating the appeal from the same, or some specified part thereof."

This does not mean that a defendant appealing shall give notice only to the plaintiff or plaintiffs; or that a plaintiff appealing, shall give notice only to the defendant or defendants; but its intendment and requirement is, that the notice shall be served on all parties whose interests are adverse to the party appealing.

The rule of the former Court of Chancery required that a notice of the appeal should be served on the solicitor of the "adverse party," and under this it was held that the notice must be served on the solicitors of the several parties whose interests as to such appeal are adverse to the appellant. (1 Barbour's Chancery Practice, 400.) In *Potter v. Baker* (4 Paige, 290), it was held that, upon an appeal from a vice-chancellor to the chancellor, the appellant must, within the time for appealing, serve a notice of the

appeal upon the solicitors of the several parties whose interests as to such appeal are adverse to that of the appellant.

And in *Thompson v. Ellsworth* (1 Barbour's Chancery Rep., 624), where the question was as to what parties the appellant was to execute a bond or bonds on his appeal, the chancellor, at page 627, said: "The adverse party, within the intent and meaning of the eightieth section, and of the (then) 116th rule of this court, means the party whose interest in relation to the subject of the appeal is in conflict with the reversal of the order or decree appealed from, or the modification sought for by the appeal." He further decided that where two or more of the parties have a common interest in resisting the reversal of the decree, a joint bond as to them was sufficient; but where there are respondents having distinct and conflicting interests in relation to the object sought for by the appeal, that separate bonds should be given to render the appeal effectual.

So, under the Code, in an action brought by executors for the construction of a will of the testator, where several heirs and devisees claiming under the will are made defendants, and a decree or judgment of the court is pronounced, allowing the claims of some of the defendants as against the others, it was held that the latter defendants on bringing an appeal from the judgment, in order to effect their appeal, must not only serve their notice of appeal and other papers upon the plaintiffs, but also upon the *defendants who have established their claims* under the will, as these defendants are the *adverse party* within the meaning of the Code. (*Cotes v. Carrol*, 28 Howard's Pr. Rep., 436.)

That case is in precise analogy with the one before us, and, to the extent above stated, the court was unanimous in its decision. A majority of that court held that it was too late to perfect the appeal by serving notice upon the defendants not already made parties to it, and struck the cause from the calendar as to them, and refused to hear the appeal as to any of the matters affecting their interests.

The other justice of that court dissented from the latter part

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of the decision, and held the appeal having been brought and notice given *in good faith* that the appellants under the second subdivision of section 327 of the Code ought to be allowed to serve notice of the appeal and copy of the case and exceptions on those other defendants, &c., and thus perfect their appeal.

I have said that Charles G. Kenyon, John S. Kenyon and Peter Mumford are the persons most interested in upholding the decree made in this action; but the plaintiff is more than nominally interested, because if a new trial should be granted and the judgment should be set aside, as against all the parties, he is interested to the whole amount of the mortgage of Phelps, because before the suit should be finally terminated the three defendants might not be able to respond for any deficiency; and he is interested in requiring that a decision should not be made against him unless it shall at the same time be effectual also against him.

I have no doubt, therefore, that we cannot decide this appeal in favor of the defendant while the three defendants who appeared in the action are not parties to it, and I have very little doubt that it is too late now to make them parties, and I think the appeal should be dismissed with costs.

All concur and judgment of dismissal ordered.

BENJAMIN N. HUNTINGTON, President, &c., v. THEODORE P. BALLOU, impleaded with JOSEPH A. SHEARMAN.

(GENERAL TERM, FIFTH DISTRICT, DECEMBER, 1869.)

The maker of a promissory note, over due, who owed the plaintiff, the indorsee and holder thereof, several other distinct debts, paid him a gross sum and took a receipt appropriating the payment, in part, to interest due on the note, and reciting that the sum so appropriated had been received from and paid by B., who was an accommodation indorser of the note without consideration, per hand of S. (the maker). The money had, in fact, been paid without B.'s authority or knowledge, but the

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plaintiff showed him the receipt, and he thereupon examined it and expressed his approval.—*Held*, that the payment took the case out of the statute of limitations as to such indorser.

MOTION for a new trial on a case, and exceptions taken at a Circuit Court, on a verdict for the plaintiff, and ordered to be heard in the first instance at the General Term.

The action was commenced against Shearman, on the 10th day of July, 1865, as maker of three promissory notes, and against Ballou on the 11th day of July, 1865, as indorser of the notes.

Shearman did not appear, and Ballou in his answer set up that he was accommodation indorser of Shearman on each of the notes, and that the notes had been past due more than six years before the commencement of the action, and were barred by the statute of limitations.

The issues were tried at a Circuit Court, held in the county of Oneida, before his honor Justice MORGAN and a jury, and a verdict was rendered for the plaintiff, on the notes, including interest, to the amount of \$6,061.87, which Ballou moved to set aside.

The material facts are stated in the opinion.

Charles H. Doolittle, for the plaintiff.

F. Kernan, for the defendant.

Present—FOSTER, MULLIN and MORGAN, JJ.

By the Court—FOSTER, P. J. The execution of the notes was admitted by the pleadings, and that Benjamin N. Huntington, the plaintiff, was the president of the Bank of Utica, a bank duly incorporated under the laws of this State, and the plaintiff's counsel read the notes in evidence, made by the defendant, J. A. Shearman, and indorsed by Sarah Shearman and also by the defendant, Theodore P. Ballou, of which notes the following are copies:

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\$500.

UTICA, *June 16th*, 1858.

Three months after date, I promise to pay to the order of Mrs. Sarah Shearman, at the Bank of Utica, five hundred dollars, value received.

J. A. SHEARMAN.

\$1,500.

UTICA, *September 17th*, 1858.

Three months after date, I promise to pay to the order of Mrs. Sarah Shearman, at the Bank of Utica, fifteen hundred dollars, value received.

J. A. SHEARMAN.

\$2,000.

UTICA, *October 5th*, 1858.

Three months after date, I promise to pay to the order of Mrs. Sarah Shearman, at the Bank of Utica, two thousand dollars, value received.

J. A. SHEARMAN.

And the proof showed that Ballou was the accommodation indorser of Shearman, and that he indorsed the notes without any consideration received by him therefor.

On the 26th of July, 1859, Shearman, without any request to do so from Ballou, and without any assent thereto, or knowledge thereof by him, paid with his own funds, on those and other demands, which the bank held against him, to the cashier thereof, P. V. Rogers, the sum of \$1,145.80, for interest due thereon, and took from the cashier a statement and receipt, a copy of which was read in evidence as follows:

“INTEREST ON J. A. SHEARMAN’S DEBT.

Higham & Co., note due Nov. 17, 1857 .	\$300 00	
Interest on same to July 1, 1859		\$34 00
Higham & Co., note due Oct. 21, 1857..	250 00	
Interest on same to July 1st, 1859		34 60
Dorastus Kellogg, due Oct. 13, 1857	717 00	
Interest on same to July 1, 1859		86 00
Dorastus Kellogg, due January 7, 1858 .	807 00	
Interest on same to July 1, 1859		83 80
Carried forward,		\$238 40

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Brought forward,	\$238 40
Utica Lock Company, due Dec. 4, 1857 .	\$312 48
Interest on same to July 1, 1859	34 38
Chatfield Pt., due Nov. 27, 1857.....	1,057 54
Interest on same to July 1, 1859	118 09
Same, due Nov. 9, 1857	1,475 24
Interest on same to July 1, 1859	169 70
Same, due Oct. 11, 1857	1,470 31
Interest on same to July 1, 1859	176 86
J. A. Shearman's note, due Sept. 18, 1858	500 00
Interest on same to July 1, 1859	27 50
Same, due Nov. 10, 1858	1,000 00
Interest on same to July 1, 1859	44 67
Same, due Sept. 21, 1858	800 00
Interest on same to July 1, 1859	43 53
Same, due July 20, 1858	800 00
Interest on same to July 1, 1859	52 86
Same, due Dec. 9, 1858.....	3,000 00
Interest on same to July 1, 1859,.....	117 66
Same, due Dec. 20, 1858	1,500 00
Interest on same to July 1, 1859	35 38
Same, due January 8, 1859.....	2,000 00
Interest on same to July 1, 1859	66 77
	<u>\$1,145 80</u>

"Received, July 26, 1859, of T. P. Ballou, per hand of J. A. Shearman, for interest due July 1, 1859, to this bank, from J. A. Shearman, as per above statement, \$1,145.80, which amounts respectively stated above, so paid by said Ballou as aforesaid, are hereby transferred as claims against the parties to the several notes, on the notes and papers referred to, subject to the claims of the Bank of Utica, for principal and interest from July 1, 1859, on the said notes, claims, demands or judgments, intended to be represented by the foregoing statement.

P. V. ROGERS, *Cashier.*"

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Rogers testified that the statement was made out, and the receipt executed in the form in which it appeared, at the request of Shearman; Shearman, who was a witness for the defendant, testified that he did not make such request, but that Rogers, if he ever executed such a receipt, drew it according to his own notion, without any suggestion from him, and without any direction from him, to have it so drawn; and, that if he ever took such a receipt from Rogers, he never showed it to Ballou, or talked with him about it.

Rogers further testified, "I showed this copy of the statement and receipt to Ballou, August 29, 1859, at my desk at the bank; I showed it to him, and stated to him, I had given such a receipt as that, and asked him to examine it. he did, and said it was all right." On his cross-examination, he also testified that he showed the paper to Ballou; that "he examined it; he took it and looked at it; his name does not appear in the statement; I think I remember his tossing the paper back and saying "that was all right." Ballou testified that he did not, to his recollection, see any such statement and receipt at any time before the trial; that Shearman did not at any time show him any such receipt, or converse about it; and to his recollection, no such receipt was shown to him by Rogers; and that he had no recollection of having any such conversation with Rogers about it, as Rogers had stated. Rogers further stated, that after he had shown the copy of statement and receipt to Ballou, and he had said it was all right, that he, Rogers, then made a memorandum thereon as follows: "T. P. B., August 29, 1859, O. K."

This conflict of testimony the jury have determined, by their verdict, according to the testimony of Rogers, and have thereby found that the statement and receipt were drawn pursuant to the directions of Shearman, and were, on the 29th of August, 1859, shown to Ballou, and examined by him and returned with his answer that it was all right. Testimony was also given to show that Shearman, on the December and July following, made payments of interest

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on the notes; but those payments were not allowed in evidence against Ballou, for the want of proof to connect any agency on his part with them.

And the principal question, therefore, is whether the evidence above given, warranted the jury in finding that Ballou adopted the payment made by Shearman, on the 26th of July, 1859, and whether such adoption amounted to a payment by Ballou, within the meaning of the statute, in reference to the limitations of actions.

In order to avoid the operation of the statute of limitations upon a demand which has been due for more than six years, before the commencement of the action, there must have been an acknowledgment or promise in writing, signed by the party to be charged therewith, or a payment by him of principal or interest must be proved.

It is well settled that a payment by one party, liable on a demand, whether maker or indorser, is not such payment as will make another party liable, and therefore the payment by Shearman, as such does, not help the plaintiff in this action; and unless, under the facts found by the jury, it is established that as between Ballou and the plaintiff, the payment was made by Ballou, the plaintiff was not entitled to a verdict against him.

It is not necessary that the *act* of such payment should be proved. It would doubtless be sufficient, to prove the payment by the oral confession of the person sought to be charged that he had made it; and although the facts proved in this case to establish the payment by Ballou are different from those of any other which has come to my knowledge, it seems clear to me that Ballou, by what took place between him and Rogers, as the jury have found, adopted the payment made by Shearman as his own and became entitled, as between him and the other parties liable on the notes, to the benefits secured to him by the receipt, and, as to the plaintiff, assumed the legal liabilities consequent upon such payment to the same extent as if it had been actually made by him.

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(*Commercial Bank of Buffalo v. Warren*, 15 N. Y., 577, 580, 582.)

These acts of his took place in the presence of, and with the cashier of the plaintiff, and the plaintiff had thereafter the right to consider Ballou as the actual payer of the interest, and to rely upon such payment as against him, and I think Ballou could not afterward repudiate such payment or claim that it was not made for him.

Rogers had the right thereafter to suppose that the payment made by Shearman was so made with the full understanding and arrangement that it should be so made for him (Ballou); and it is too late when, without such payment, the debt would be barred, to set up that his acts, which induced the plaintiff to delay the commencement of the action, did not amount to an admission of payment by him.

On the trial two deeds for the transfer of real estate were given in evidence by the plaintiff against the objection and exception of Ballou. I do not think that the court committed any error in receiving them in evidence. They were intended as a portion of the evidence to show that Ballou was more than an accommodation indorser, and that the indebtedness to the bank arose out of transactions in which Ballou was interested with Shearman; but the proof failed to establish this, and it is quite clear, from the manner in which the court submitted the case to the jury, that Ballou could not have been prejudiced thereby.

So, too, several exceptions were taken to portions of the charge of the court; but it is sufficient to say that the question was clearly left for the jury to find (assuming that Shearman made the payment from his own funds, and took the statement and receipt without any arrangement or assent to his doing so on the part of Ballou, and without any subsequent arrangement between them that Ballou should adopt the payment as his own), whether the facts were as sworn to by Rogers, and that if so, the plaintiff was entitled to recover.

I think the charge of the judge was correct, that a new

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trial should be denied, and that judgment on the verdict should be entered for the plaintiff.

MORGAN, J., concurred.

MULLIN, J., did not vote.

Judgment for the plaintiff.

JERODINE E. POWERS, Respondent, v. ERASTUS B. FREEMAN,
Appellant.

2 L 127
82 AD 365

(GENERAL TERM, FIFTH DISTRICT, DECEMBER, 1869.)

A mortgagee of chattels cannot obtain a lien upon other similar chattels, as against a subsequent purchaser thereof, through a verbal agreement between himself and his mortgagor to consider them substituted in the place of those described in the mortgage.

And to protect himself against a subsequent purchaser of the mortgaged property, he must pursue the statute respecting the filing of his mortgage literally.

Thus, where the mortgagor resided in the town of Antwerp, Jefferson county, and bought a farm and stock thereon, in the town of Wilna in that county, and gave a mortgage on the stock, and a few days after moved his residence to the farm, and the mortgage was filed in the latter town.—*Held*, that it was void as against a subsequent *bona fide* purchaser.

The payee and holder of an over due promissory note, given for money loaned by him to the maker, purchased personal property from the latter and surrendered the note as the consideration for the sale,—*Held*, that he was a *bona fide* purchaser, as against a prior mortgagee of the vendee, of whose mortgage he had no actual or constructive notice.

The decision in *Day v. Saunders* (3 Keyes, 347), commented upon and explained, and held to be decisive in this case.

APPEAL from a judgment rendered on the verdict of a jury.

The action was brought to recover the value of eight cows, which the plaintiff claimed to own, and which the defendant took and converted to his own use.

It appeared that on the 1st day of October, 1866, one Emerson E. Hall, who was the father of the plaintiff, entered into a written contract with the defendant to purchase from

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him a farm of about 281 acres, lying in the town of Wilna, in the county of Jefferson, at the nominal price of thirty-five dollars per acre, but with an oral arrangement between them, that the real price should be thirty-three dollars per acre, and that all above that price, should be indorsed as paid on the contract. By the terms of the contract, Hall was to pay to the defendant for the first two years annually, the interest on all sums unpaid. In each of the next two years he was to pay \$400 of principal in each year, and the annual interest on the whole sum, and the residue of principal was to be paid in each of the six following years, in equal payments, with interest annually. On the day that the writings were executed, there was indorsed on the contract \$1,163.14, of which \$600 was an actual payment then made by Hall to the defendant, and the residue was the difference between thirty-three dollars, the real price per acre, and thirty-five dollars which was the amount included in the contract.

On that same day, the defendant sold to Hall, eight cows, and in security for the purchase money, Hall executed to the defendant a chattel mortgage on them to the amount of \$400, and Hall took possession of the cows, and continued in possession until he disposed of them as hereinafter stated.

At the time the chattel mortgage was executed, Hall resided in the town of Antwerp, in Jefferson county, and continued to reside there until the 17th day of October, aforesaid, when he removed to the farm so purchased by him in Wilna, and continued to reside there until after the commencement of this action; his daughter, the plaintiff, who was a widow, continued to live with him, though not as a servant, during all that time, as she had also done for several years previous thereto.

The chattel mortgage was never filed in the office of the clerk of the town of Antwerp, and was never filed anywhere, until the 2d day of November, 1866, when it was filed in the town clerk's office of the town of Wilna, where Hall then resided, and a copy of it was never thereafter filed anywhere.

Between the time of executing the chattel mortgage, and the fall of 1867, Hall sold and disposed of five of the cows which he had mortgaged to the defendant, and from time to time purchased others; and, on the 12th day of December, 1867, had in his possession three of the cows included in the mortgage, and five others, being those which he had so afterward purchased. And it was claimed by the defendant, that the five cows were disposed of by Hall under a verbal agreement between them that he might do so, and that those purchased by him should be substituted for those in the mortgage. And testimony offered to prove that, was ruled out by the court, to which the defendant's counsel excepted. No part of the indebtedness of Hall secured by the chattel mortgage was paid, and no subsequent payment was made toward the farm.

The plaintiff held two promissory notes against Hall, one for the sum of \$300, and the other for \$250, executed to her for moneys which she loaned to him in 1864, and 1865, the validity of which debts was not disputed, but was conceded on the trial.

On the 12th day of December, 1867, Hall sold to the plaintiff the eight cows in question, at forty dollars each, together with a quantity of hay, one buggy and one sleigh; in payment, as far as they would go, of the two notes, and the property was turned out to her, but they remained on the farm where she and Hall continued to reside, and on the same day she canceled and delivered up the \$300 note to Hall, and the residue of the purchase money, being \$107.50, was indorsed on the \$250 note, which she retained in her possession. Both notes were past due at the time of this transaction.

On the 13th day of December, 1867, the defendant, while the cows remained on the farm, took all of them and drove them away, claiming them under the chattel mortgage, and converted them to his own use; the plaintiff being present, and forbidding his taking them, and claiming them as her own. The proof showed the cows to be worth forty dollars

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each, making in all \$320, for which sum the jury rendered a verdict for the plaintiff. The defendant gave evidence to show that the plaintiff had actual notice of the chattel mortgage before she purchased the cows. The plaintiff gave evidence to prove that she did not have any knowledge or notice of the mortgage, and the jury must have decided that conflict of testimony in her favor.

Judgment was entered for the plaintiff according to the verdict, and the defendant appealed

Levi H. Brown, for appellant.

D. J. Wager, for respondent.

Present—BACON, FOSTER, MULLIN and MORGAN, JJ,

By the Court—FOSTER, J. There can be no question but that the sale of the eight cows, made by the defendant to Hall, on the first day of October, 1866, transferred all the title, which the defendant had to them, subject only to the mortgage which he took to secure the payment of the purchase price. The mortgage recites, "that Emerson E. Hall, of Antwerp, Jefferson county, is indebted to Erastus B. Freeman, of Leray, in the sum of \$400, being for the security of eight red cows, on said Freeman farm in Wilna, *that have been sold with said Freeman farm to said Hall*; and this mortgage shall be void if said Hall shall pay up the first year's interest on the balance of purchase money for said farm, for the year 1867, as required in an article of agreement this day made; and in case of non-payment of said interest, said Hall shall not be required to do more than return said cows, *or those of equal value*. Now for securing the payment of the said debt, and the interest thereon, from the date thereof, to the said Erastus B. Freeman, I do hereby sell, transfer and assign to the said Erastus B. Freeman, the said eight red cows, *now the property of said Hall*, and on his farm in Wilna; *Provided* always, and this mortgage is on

the express condition," &c. The sale to Hall was not conditional, but was absolute; and the only claim that the defendant could afterward have upon them was under his mortgage. And if Hall afterward sold any of them, the only claim that defendant could have on them, against the purchaser, was in his character of mortgagee.

The court held that as to the five cows which Hall subsequently purchased, and which he sold to the plaintiff, the defendant had no legal claim, and that for those the plaintiff was entitled to a verdict. To which the defendant's counsel excepted. I have no doubt that this ruling was correct, and that no verbal arrangement which the defendant and Hall may have entered into after the execution of the mortgage, could, as between the defendant and a subsequent purchaser from Hall, subject the cows, not originally included in the mortgage to its terms, or give the defendant a lien thereon as such mortgagee. If his mortgage was valid as against a purchaser in good faith, he might follow the mortgaged cows into the hands of the purchaser and reclaim them; but he could not in any event claim the five cows purchased by Hall of other persons by virtue of that instrument. To allow this would be to uphold mortgages by parol.

Three of the cows in question were included in the mortgage, and it becomes important to inquire whether it was ever so filed as to protect the defendant against a *bona fide* purchaser of them from the mortgagor.

The statute, 4th Ed. 2 R. S., page 318, sec. 9, declares that "every mortgage or conveyance intended to operate as a mortgage of goods and chattels hereafter made which shall not be accompanied by an immediate delivery, and be followed by an actual and continued change of possession of the things mortgaged, shall be absolutely void as against the creditors of the mortgagor, and as against subsequent purchasers and mortgagees in good faith, unless the mortgage or a true copy thereof shall be filed as directed in the succeeding section of this act." And the tenth section declares that "the instruments mentioned in the preceding section shall be filed

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in the several towns and cities of this State where a mortgagor therein, if a resident of this State, shall reside at the *time of the execution thereof*; and if not a resident, then in the city or town where the property so mortgaged shall be at the time of the execution of such instrument." And the same section requires such filing to be in the *Clerk's office* of the town.

There being no question that Hall was a resident of the State, and of the town of Antwerp, and that the mortgage or a copy thereof was not filed in the office of the town clerk of that town, the instrument was absolutely void as against subsequent purchasers in good faith and the filing in the town of Wilna in November, 1867, after Hall removed to that town, did not restore vitality to it as against such purchasers.

It is not enough to say, that the filing in Wilna was better calculated to give notice of the mortgage, than the filing in Antwerp would have been. The answer to that is, that the language of the statute is clear and explicit, in requiring it to be filed in the town where the mortgagor resides at the time of its execution, and its requirements must be observed by the mortgagee, if he would have his mortgage valid against such purchasers. And he has no right to substitute for it anything else, though he may think it would give much better information of its existence than if he literally followed the requirements of the statute. Persons who subsequently deal with the mortgagor in regard to the mortgaged property, are bound to take notice of the requirements of the statute, and are bound to look for mortgages where the statute declares they shall be filed.

If therefore, the plaintiff was a purchaser of the cows in good faith, the mortgage as to her was absolutely void, and she was entitled to recover for the three cows, which were included therein, as well as for the other five in question.

The jury have found that she had no knowledge or notice of the mortgage; that Hall's debt to her was an honest one; that he sold the cows to her in part payment of her debt, and

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that she took the delivery of them and canceled and gave up to him the \$300 note, and indorsed the residue on the other note, both being then past due. She is, therefore, a purchaser in good faith, provided the giving up and canceling of one note, and the indorsement upon the other of the balance of the purchase price, both being due, forms such a consideration for the purchase as is necessary to make one, in that respect, a purchaser in good faith.

We need not stop to inquire how the law in this respect has formerly been held by the courts in this State, essentially variant from the English decisions, and from the decisions of the courts of several of the other States, that while the giving up of a promissory note not matured, constituted such a consideration, that the giving up of a note past due did not. It is sufficient to say, that the decision of the Court of Appeals in the case of *Day v. Saunders* (3 Keyes, 347), has settled the law that there is no such distinction, and that the canceling and giving up a promissory note after it has become due furnishes a good consideration.

The distinction in that respect was, at best, quite vague, and must have proceeded upon the assumption that promissory notes, while maturing, were used as a medium of exchange; and, to a considerable extent, were used as a circulating medium, and took the place of money, and that they were to be regarded, in transactions founded upon them for a consideration, as money, while notes which were dishonored did not perform any such office. And the time probably was when such state of things was real; but in these days, the idea that notes maturing are, to any considerable extent, used as a medium of circulation, or perform any of the usual offices of money, is too fanciful to give them a preference, as a consideration, over such as have matured, the holder of which could at any time take legal measures to secure a preference over creditors of the payee whose debts were not due, who were not in a situation to take any legal measures to collect their debts.

And however this may be, the case of *Day v. Saunders*

removes the distinction, and holds that the giving up of either class of such notes constitutes a good consideration.

It is claimed, however, on the part of the defendant, that the decision in *Day v. Saunders* does not apply to this case. That was an action by the holder against the accommodation indorser of one Whipple, and on the trial it was established that Whipple was the maker of the note in suit, and that Sanders, the defendant, indorsed it for the accommodation of Whipple, and for the express purpose of turning it out in part payment for a farm which Whipple was about to purchase, and for no other purpose. That Whipple did not purchase the farm, but that he turned out the note to the plaintiff in payment of a prior note of Whipple to them, which was not due, and also in payment of one which was past due; and it had already been decided that so far as the giving up the note, which had not matured, the consideration to that extent was good; but the court in this district held that the giving up of the note past due did not furnish a consideration for the transfer of the note in suit, and that to that amount the plaintiff could not recover of Sanders. On appeal to the Court of Appeals, the judgment of the Supreme Court was reversed, and it was decided that the giving up of the note which was past due was also a good consideration, and constituted the plaintiffs holders for value to the whole amount of the note in suit, and entitled them to recover the whole amount of it from the indorser, although it had been fraudulently, as to him, put in circulation by the maker.

Now, if as against an accommodation indorser of negotiable paper fraudulently put in circulation by the maker, the holder, who gives up for it a promissory note of such maker past due is held to have paid a good consideration, it is impossible for me to discover any reason why the same thing would not constitute a purchase of personal property without notice as against the holder of a chattel mortgage, who himself neglects to give the notice which the statute requires him to give, to protect himself against such purchaser, a purchaser for

good consideration also. I think the principle applies equally to either case, and is decisive of that question in this action.

It follows, then, that the judgment below must be affirmed unless some of the rulings of the judge at the circuit were erroneous.

The views which I have taken necessarily dispose of all the questions raised on the trial, including the charge of the Judge, except one.

Toward the close of the trial the defendant was recalled as a witness in his own behalf, and after having been twice examined in chief and cross-examined on his third examination, his counsel offered: "Brown—I offer to show that it was then agreed between them before the sale and purchase that they might exchange or sell those, exchange those for others and sell those, and with the avails purchase others, and that they agreed that they should be held, the title vesting in Freeman, the same as those exchanged; and I propose to follow it up by showing that after they were procured by Hall the cows were pointed out; a formal delivery of them under the agreement. Court.—He says they were pointed out to him. Brown.—And that all of that was brought home to the notice of the plaintiff before her pretended purchase." This was objected to and excluded, and defendant's counsel excepted.

It is claimed for the defendant that this "proposition was in substance to show that Hall purchased the five cows as agent of and for Freeman, delivered them to him, and held the same as his agent only; in other words, that those cows were the property of Freeman and in his possession by Hall as his agent, and that plaintiff knew the fact when she claimed to purchase."

Now, there is not only nothing in the facts offered to be proved which would tend to establish such agency, but there is no evidence in the case from which such agency could be inferred, nor is there anything to show that from the time alluded to in the offer the defendant ever had the actual possession of any of the cows until he took and drove them away on the 13th of December, 1867. If the proof contained in

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the offer would establish anything in favor of the plaintiff, it could only have been that the parties attempted by what they did, to subject the five cows purchased by Hall of others to the original mortgage, though it is not claimed by the offer that any mention was at that time made of the mortgage. And the jury having found upon the whole evidence that the plaintiff had no knowledge or notice of the mortgage, the proof that she knew of the transaction so offered in evidence could not possibly have aided the defendant in his defence.

The mortgage was originally filed by the defendant, on the 2d day of November, 1866. True, it was filed in the clerk's office of the town of Wilna, but so far as the defendant was concerned, it was a filing, and at all events, more than a year had elapsed after the making of the mortgage, and more than a year after such filing, and therefore when the plaintiff purchased the cows for a good consideration, although she might have known of the mortgage originally, or of the facts proposed to be proved, she had the right from the fact that a copy of it had not been filed at any time, and that much more than a year had elapsed, as well after the date of the mortgage as after the original filing, to presume, when she made the purchase that the claim of the defendant, whatever it may have been was satisfied and discharged.

The statute declares that chattel mortgages, filed pursuant to the act, shall cease to be valid as against the creditors, and subsequent purchasers and mortgagees in good faith after the expiration of one year from the filing thereof unless within thirty days, next preceding the expiration of the said term of one year, a true copy of the mortgage, together with a statement of the interest of the mortgagee in the property thereby claimed by him, shall be again filed in the office of the clerk of the town where the mortgagor shall then reside. (R. S., 4th ed., 318, § 11.)

If the mortgagee properly file his mortgage when he receives it, and he does not file a copy with the statement, within thirty days before the expiration of a year thereafter, subsequent purchasers for a valuable consideration, and with-

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out notice that it is not paid, will be protected against it; and certainly the same protection will be afforded to them, if at the expiration of the year it has not been filed at all, or has been improperly filed originally, and no copy thereof, with statement, filed within the year.

It would not be enough, therefore, for the defendant to show that the plaintiff knew of the original mortgage; but he was bound also to prove, that when she purchased after the expiration of the year, she knew, or had notice, that the mortgage debt had not been paid.

The testimony offered and excluded could not have benefited the defendant, and its exclusion was proper.

The judgment should be affirmed. All concurring.

Judgment affirmed.

LUTHER B. DURST v. DAVID BURTON, JAMES FOLTS and ALEXANDER BRIDENBICKER.

(GENERAL TERM, FIFTH DISTRICT, OCTOBER, 1869.)

An association carrying on the manufacture and sale of cheese, and owning a factory and machinery suitable for its business, made, through its managing committee, a year's lease of the same to C., agreeing to provide him utensils and conveniences, in good order, for the manufacture of cheese; C. thereupon agreed to pay \$600 rent and the taxes of the premises; manufacture into cheese in a skillful and workmanlike manner the milk (restricted to the produce of 800 cows) furnished the factory; provide materials for use in the manufacture; box and prepare the cheeses for market, half according to a size named, the rest according to hoops to be provided by the committee, insure them while remaining at the factory, and deliver them thereat as the committee should direct.

It was a further part of the agreement, that each "patron" or person supplying milk, should have a proportionate part of the whey, either fed to his stock, at so much per head on the premises, or delivered to him thereat, and that C. should account for half the proceeds of surplus whey sold by him; that C. should keep accounts, make a statement of each sale of the cheese, exhibiting the proportionate amount due to each patron from such sale, on account of milk furnished by him, after deducting the price of manufacture and charges for keeping and feeding stock;

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pay the rent agreed to the committee by deductions from the proceeds of sales in proportionate sums, as due thereat respectively, omitting the two first sales; give the business all necessary personal attention; not under let it, and at the expiration of his lease surrender in good order, &c. The committee agreed that the patrons should furnish C. one good rennet for the milk of each cow, and pay him a per centage upon each 100 pounds of cheese sold and delivered.

C. entered into the premises and manufactured cheese, some of which was sold to the plaintiff as good merchantable cheese, on behalf of the association by the defendants, who with one P. constituted the committee, and who were also patrons of the association and interested as such, in the sale. The cheese so sold had been fraudulently manufactured of sour curd by C. and his employes, and was of bad quality on that account. In an action to recover damages for fraud in the sale.—*Held*, that the defendants were liable for the fraud of C. and his employees and servants, on the ground of their agency for the defendants in manufacturing the cheese, and although the defendants might, in fact, have been ignorant thereof.

Held further, that the measure of damages being the difference between the actual and represented value of the cheese, and the sale having been made with reference to the market at New York, and the value at that place, in fact, and the value which it would have had there, if as represented, being shown, evidence of the amount actually realized by sale of the cheese in England was inadmissible to reduce the defendant's damages. Nor were the defendants entitled to show that the market price for cheese at New York was controlled by the market of London, in connection with proof that through sales at London, in the ordinary course of business, the plaintiffs netted a larger sum for the cheese than the actual market value thereof in New York, and especially, when the evidence did not relate to the time in question.

CASE and exceptions on a motion for a new trial. The action was tried at the Herkimer circuit, before MORGAN, J., and a jury, and a verdict was rendered for the plaintiff for \$1,400.

Exceptions were taken and a case made on the part of the defendants, and were ordered to be heard, in the first instance, at the General Term.

The material facts are stated in the opinion.

F. Kernan, for the plaintiff.

R. Earl, for the defendants.

Present—BACON, FOSTER and MORGAN, JJ.

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By the Court—FOSTER, J. The action was brought to recover damages for a fraud alleged to have been committed by the defendants, in the sale by them to the plaintiff of a large quantity of cheese.

Previous to and during the year 1866, the defendants were members of an association for the manufacture and sale of cheese, at Frankfort, in the county of Herkimer, and were joint owners as such, with their associates, of the cheese factory, with all the machinery and utensils used in the business, and were members of a committee for the management of the affairs of the association, and were also interested in the cheese to be made there; they severally furnishing a portion of the milk to be manufactured into cheese.

About the 8th of August, 1866, the plaintiff made a bargain with them, in pursuance of which they immediately afterward delivered about 40,692 pounds of cheese, to be shipped to one Burrill, a commission merchant and cheese dealer, in the city of New York.

When the bargain was made, a part of the cheeses were in their boxes, and a part were uncovered; and afterward, the residue of the cheese was boxed by the defendants, or under their direction, and were marked or branded with the name of their cheese factory, and directed to the care of Burrill, at his place of business in the city of New York; and the plaintiff paid to the defendants, toward the cheese, the sum of \$5,000.

Afterward, the plaintiff and defendants disagreed as to the bargain which had been made, and the defendants in this suit and their associates, commenced an action against Durst in this court, and in their complaint charged that the cheese was sold to him; that the sale was absolute, at the price of seventeen cents per pound, and claimed to recover of him at that rate for the whole amount of cheese, after deducting the \$5,000 which they had received.

Durst, in his answer, claimed and set up that the bargain for the cheese was made by him as the agent of Burrill, and not for himself. That his agency was known to them at the

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time of the bargain. That the cheese was not purchased, but was to be shipped by them to Burrill in New York to be sold by him on commission, and that the defendants were to be paid the net proceeds, after deducting expenses and the commissions of Burrill, and the \$5,000 which had been advanced to them.

That Burrill received and sold the cheese on commission, and rendered an account thereof; that the net proceeds was \$6,309.97, leaving a balance due to them of \$1,309.97, which together with interest amounted to \$1,316. That he delivered to and left with them the account, and tendered to them the said sum of \$1,316, which they refused to accept.

That the tender was made before the commencement of that action, and he offered to bring the money into court. That issue was tried before referees, who found a sale of the cheese to Durst at seventeen cents per pound, and charged him with the whole amount and interest, deducting the \$5,000 which had been advanced; and judgment was rendered against Durst for the balance over the \$5,000, and the interest, amounting to the sum of \$2,025.02, besides costs. Judgment was thereupon rendered in their favor, against Durst for that amount and costs, and the judgment was paid and satisfied.

Afterward Durst commenced this action, and in his complaint he set out, the complaint and answer, report of referees, and judgment, in the other action; and alleged the said payment thereof; and then claimed to recover against these defendants (*as upon a sale to him*), for a fraud committed in the sale of the cheese; alleging that the defendants fraudulently represented the cheese to him to be of a good marketable quality. That the defendants, their agents and servants, had knowingly used sour, adulterated, and rotten milk and curd, in the manufacture of the cheese; by means of which the cheese was of an inferior quality, and unfit for use; all of which was known to the defendants, their said agents and servants, but which was unknown to the plaintiff, and which they concealed from him, with a view to induce

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him to purchase the cheese and to defraud him; and he claimed damages to \$2,500.

The answer of the defendants did not deny any of the allegations concerning the prior action or the proceedings and judgment therein, or the payment of that judgment by the plaintiff.

But they denied that they had the general charge, management or control, of the making or sale of the cheese, or that the cheese was of an inferior quality, or improperly made; and they denied every allegation of fraud charged in the complaint, or that the plaintiff relied on any representations made to him, but that he purchased relying on his own inspection of the cheese. They also denied any intent to cheat or defraud the plaintiff; or that he sustained the damage alleged in the complaint. And they denied that they were a committee for the sale of the cheese, or that they did sell it to him.

The undisputed testimony showed that the defendants were owners, with a number of other associates, of the cheese factory in question. That they furnished a portion of the milk out of which the cheese in question was manufactured. That they were owners of their proportionate share of all the milk delivered to the factory, and of all the curd and cheese manufactured there, at all times until the sale to the plaintiff took place, and that they were a committee of the association, and as such had the oversight of the affairs of the association. The jury could not well doubt, under the evidence, that two of them at least, if not all of them, were acting in and made the sale of the cheese to the plaintiff, and that they represented the cheese to him as being of a good marketable quality. The jury were also well warranted in finding, that the persons who were engaged in the manufacture of the cheese, fraudulently used sour and damaged milk and curd in its manufacture, which was concealed from and unknown to the plaintiff; and that the cheese was of a very inferior quality, and a large portion of it unfit for market, whereby the plaintiff sustained damage to a larger amount than was

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recovered by the verdict; and I think the jury would have been warranted in finding, that at least one, if not two of the defendants knew of such improper and fraudulent manufacture of the cheese in question, while it was being made.

The plaintiff, however, cannot claim here, that the jury have so found, nor can he rely upon what he claims to be the law of the case; that he is entitled to recover against them, merely because as vendors they stated that the cheese was a good marketable article, even though they were not aware that it was fraudulently made; because the court charged the jury "that if there was no design by the defendants, or their agents or employes to commit a fraud, but the cheese, or some of it, was badly manufactured, for want of skill, or by accident, the defendant would not be liable to the purchaser in this action; and that if General Campbell, and those employed by him, put sour curd into the cheese, without fraud, then the defendants are not liable."

The court also charged the jury, among other things "that General Campbell was employed by the defendants as the agent to manufacture the milk of the patrons of the factory into cheese, and he was authorized to employ other help for that purpose. If General Campbell, or those employed by him to assist, purposely and designedly used the tin hoops to conceal the sour curd in the cheese they manufactured for the patrons of the factory, so as to materially injure the quality of the cheese, these defendants having sold the cheese for good cheese, although having no actual knowledge of the fraud, are responsible to the purchaser for the fraud committed by their employes and agents." To which the defendants' counsel excepted.

The court also held and decided "that the defendants were responsible for any fraud in the manufacture of the cheese which affected its goodness in the market, whether it was committed by General Campbell himself or by the cheese makers he employed, or by any servants in their employ. If it was actually put into the cheese (this sour curd) so as to affect the cheese, the defendants in this case, having sold the

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cheese for good cheese, are responsible, although they had no absolute knowledge of the fact, on the ground that they were bound to know it and communicate it; and that the only question (aside from the quantity of damages in case the verdict should be for the plaintiffs) was whether the alleged fraud in the manufacture of the cheese was committed by General Campbell or his servants." To which the defendant's counsel excepted.

In order, therefore, to maintain the verdict it must appear that the relation of the defendants to General Campbell and his employes was such as to constitute him and them agents or servants of the defendants.

If it was not, the plaintiff was not entitled to recover; and if it was, I have no doubt that they are responsible for the fraudulent acts of any of them, though in fact the defendants were ignorant of the fraud.

It is an elementary principle, and one absolutely necessary for the protection of innocent persons, that a party shall be held accountable for the fraudulent acts of his servant or agent in the transaction of the business intrusted to him where such fraudulent acts result to the injury of a third person who in good faith deals with such party or agent and suffers thereby.

The authorities in support of this proposition are numerous and conclusive, and those cited to us by the plaintiff's counsel (Story on Agency, chap. 17, sec. 452; 2 Kent's Com., 11th ed., 842, note *a*; *Jeffrey v. Bigelow*, 13 Wendell, 518, 519, 520, &c.; *Bank of U. S. v. Davis*, 2 Hill, 452; and *Griswold v. Hover*, 25 N. Y., 595, 600, and cases there cited) are full to the point; and see Dunlap's Paley (4th Am. ed., 301 302, and cases there cited under note [1]).

And the rule is the same as to the liability of partners for the frauds of each other, and upon the same principle. (13 Wendell, *supra*, 520; 25 N. Y., 597, 600; 1 Tenn. Rep., 12.) That in all their copartnership acts, they act as the agents of each other and of the firm.

The only question arising on the merits is, was General

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Campbell, and were his employes the agents of the defendants, so as to bring the defendants within the rule above stated?

On the 6th day of February, 1866, the defendants and one Pierson, who was also a member of the committee, entered into a contract with General Campbell, in substance as follows: To lease to him their cheese factory, building and premises, utensils and appurtenances for manufacturing cheese, and to furnish all necessary presses, cheese hoops, setters and rangers for the use of the factory, with an ice-house, and a proper place to keep lime, for the sum of \$600 for one year; to commence March 1st, 1866, and ending the last of February, 1867; Campbell was to pay the \$600 to the committee, or association, manufacture the milk furnished to the factory into cheese and take care of the cheese until sold and taken away, in a good, skillful and workmanlike manner; furnish all the cheese boxes (which were to be good), all the bandaging, salt, annatto, press cloths, ice, wood, coal, lime, and everything necessary to manufacture the cheese, except that each patron was to furnish one good rennet for each cow whose milk was taken to the factory. That after the two first sales of cheese made, Campbell was to pay, and have taken out and deducted the proportion of rent due from him at each sale thereafter. He was to pay all taxes assessed on the premises during his lease; to keep an insurance on the cheese of \$5,000 while in the factory, and was to weigh, box and deliver the cheese at the factory, to such persons, at such times, and in such quantities as the committee should direct. He was to press one-half of the cheese in quantity, in the same sized hoops as were used there the year previous, and the other half in smaller hoops, as the committee should furnish and direct. He was to keep proper books and accounts, make a statement at the time of each sale, embracing the amount of milk and the quantity of cheese of each patron included in the sale, and showing the proportionate amount of each patron after deducting the price of manufacturing the cheese and feeding the hogs of such patron. At the end of

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the lease he was to leave everything in good order, ordinary wear and tear excepted. He was to use diligence to detect all diluted, adulterated, filthy, skimmed or sour milk, and inform the committee of the persons so offending, whereupon it becomes the duty of the committee to stop such persons from delivering any more milk, and if the committee refused so to do, Campbell was authorized to put an end to the agreement. If patrons chose to keep hogs at the factory, they had a right to do so, at the rate of one hog for five cows, and Campbell was to feed them with the whey and was to receive six cents per week for each hog so fed by him, or they might take away their proportion of the whey, daily in a quantity of three-fourths of the amount of the milk, which they furnished, and if Campbell sold the surplus whey he was to account for one-half of the proceeds. He was to feed and take care of the hogs of the patrons, which were kept there in a proper manner, and was to give the business in and about the factory, all necessary personal care and attention, *and he was not to underlet the same.* The committee contracted and agreed that the patrons should pay to Campbell at the rate of \$1.65 for every 100 pounds of cheese so manufactured, when sold and delivered. They were to see that the vats, utensils, whey conductors, floor, sink, hoisting apparatus and drain were to be put in good order to start the factory, and were to indemnify Campbell against any damages in consequence of the factory being stopped during the time of making cheese, by the acts of any person other than the patrons, or of Campbell himself. That Campbell should not engage or contract, and receive the milk of more than 800 cows, to be manufactured into cheese, there, and that he should not make any extra charge in case he manufactured the milk into cheese twice a day in separate messes.

Campbell, who was a witness for the defendants, supposed that property in the cheese was in him, and that his assent was necessary before a sale could be effected, but I think it is perfectly clear that the contract gave him no authority

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over the cheese, except to take good care of it, and to deliver it as the committee should direct him. And the contract gave him no such interest in it, as would make him the proper party to fix a price upon it. He had no ultimate interest in regard to it, beyond one and sixty-five one-hundredths of a cent per pound, the price which he was to receive when it was sold; and as to that, he had the express contract of the committee, that the patrons should pay it; and at all events it was unimportant to him, whether the cheese brought a full price or not, so long as he got his price for making it while the patrons were interested, and their committee, for them and for themselves, in obtaining for it all that it was worth in the market. But there can be no dispute upon the construction of the contract, that the patrons alone owned the milk, the curd, the whey, and the cheese at all times, until it was sold to the plaintiff. It was made for them, and every step in the process of making it was taken for them, at their risk and at their expense, and it cannot be doubted from the contract, that it was intended that the committee should have the general oversight of it, and that they could stop the manufacture of it, if Campbell did not follow their instructions in regard to it. And the proof shows, that the members of the committee were, some of them, sometimes, once or twice a day, and sometimes less frequently, at the factory, as such committee, attending to the business going on there. I think that Campbell, and those immediately under him, were none the less the agents or servants of the defendants because he leased the factory. The whole thing was a contract, by which he was to manufacture the cheese for the patrons who were represented in and by the contract, and for no others, because all who were to become patrons, even if they were not so when the agreement was executed became patrons under that agreement, and were subject to all its provisions in their favor, and in favor of Campbell. And Campbell could neither extend the amount of patronage beyond the milk of 800 cows, nor was he at liberty, though the patrons under that agreement should furnish milk from

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less than 800 cows, to make cheese there, for other persons not patrons, upon any terms whatever.

He was, therefore, their agent under a special rate of compensation set forth in the agreement, and his employes were also the agents and servants of the patrons of the factory.

A large class of cases has been cited by the counsel for the defendants, for the purpose of showing that a person situated as Campbell was, is not an agent, so as to make the defendants responsible for his fraud, or the fraud of those who helped him to manufacture the cheese. I, however, fail to discover any analogy between any of these cases and the one under consideration which calls upon us to relieve the defendants from the consequence of their fraudulent conduct. They are all cases of actions brought to recover damages sustained by negligence, and brought against municipal corporations which have contracted with individuals to improve streets or to make other improvements, or repairs for such corporations; against individuals who had contracted with others to build houses or walls, or other erections for them; against persons who have contracted with steamboats or tugs to tow their vessels, and which have been so towed that collisions have occurred and damage has been sustained thereby by the parties suing, and in other kindred cases; and where in all the cases the negligence has been the act of the party contracting to do the work, or perform the service, or of his subordinates; and where the injury has happened while the work was being performed by him and was unfinished; where the negligent act of such contractor was the immediate and only cause of the injury; where no act of the defendant contributed to the injury; where no possible benefit occurred to him in consequence of the act; and where also the law would afford redress by action against the party whose negligent act caused the injury.

In this case I think I have shown that the defendant and all the patrons had the control and direction of the making of their cheese, and at least that they were bound to know whether it was honestly made or not. The injury to the

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plaintiff did not happen while the cheese was being made. It did not happen *immediately* from the fraudulent manufacture of the cheese, but afterward when the sale took place from the fraudulent making, and from the representations of the defendants taken together. It can scarcely be claimed that this plaintiff could maintain an action against Campbell, though it were admitted that he or his employees committed a fraud in making it. And it is very clear that by selling the inferior article, as they did, for a good marketable one, they were benefited and received a much larger price for it than they were entitled to receive from the plaintiff, and a much larger price than he would have paid them if he had not been induced by them to suppose the cheese was good.

It is because the principal receives more in consequence of the fraud of his agent, in the sale of his property, than he otherwise would, that the law holds him in a civil suit, as having adopted the act of the agent, and made it his own. And it is for that reason that he is held liable to the purchaser for the damages which he has sustained. It was the fault or misfortune of the defendants, that they allowed the fraudulent manufacture of their cheese, and therefore inequitable that they should so act, though ever so innocently, as to charge the plaintiff with the consequences.

The defendants' counsel offered in evidence, the account of sales rendered by Burrill, and which was set up in the previous action, by which it appeared that the net proceeds of the cheese, almost all of which, it appeared, was shipped to England and sold there, amounted to \$6,309.97, as evidence to reduce the damages of the plaintiff. The plaintiff's counsel objected and the court excluded it, and defendants' counsel excepted.

The ruling of the court was correct. It had been proved, that the cheese in question, if it had been, as it was represented, was worth in New York the sum of nineteen cents per pound, and that as it was, it was only worth twelve. New York was the market to which both parties knew the cheese was to be sent, and the defendants had it marked for that

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market; and proof of what the cheese actually brought in England, could not be competent to change the rule of damages, which clearly is the difference between what it would be worth, if as represented, and what it was actually worth as it was. The question, whether the ultimate loss of the purchaser was actually more or less was wholly immaterial. For aught that appears before the sale in England took place, the price of cheese, both there and in New York, had materially advanced, and at all events, it was not only incompetent evidence, but it would be manifestly unjust to allow to the defendant, that rule of damages in this action, when they repudiated that account when it was rendered to them, and the balance of it, over the \$5,000, was tendered to them, and when they brought an action, and recovered of the defendant a greater sum, by more than \$600.

The defendants' counsel asked one of their witnesses: "Is the market for cheese in this country largely controlled and influenced by prices in London and Liverpool?" The plaintiff's counsel objected to the question. The defendants' counsel said that he proposed to show the market of London, for cheese, is just as good a test for the price of cheese as New York; that he offered it with the view of making the account of sales competent evidence, and that he proposed to show that the cheese was sold in London. The court excluded the evidence, and defendants' counsel excepted.

The defendants' counsel then offered to show, by the witness, that the cheese market of New York, and of this whole country, is controlled and regulated mainly by the price of cheese in London and Liverpool, and proposed to follow it up by showing that this cheese was shipped to London, and sold in the market of London to divers purchasers, and netted the plaintiff, over and above all expenses, at Frankfort, sixteen and a half cents per pound; and also proposed to show that the sale was made in the ordinary way, by the returns, in the ordinary course of business. This was objected to by the plaintiff's counsel, and the court excluded the evidence, and defendants' counsel excepted.

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The defendants' counsel then offered to prove the same facts as above offered, and to follow it up by showing that the plaintiff said the cheese brought such a price in London as to net him sixteen and a half cents per pound at Frankfort. This also was objected to and excluded, and defendants' counsel excepted.

None of the authorities cited by the defendants' counsel tend to establish the rule of evidence which he contends for. The true question was, what would this cheese have been worth in the market in New York when it reached there, if it had been as represented, and what was it worth there, at that time, as it was? There was no doubt, on the trial, that there was then a market price in New York for cheese, which was well known there from day to day, and in such case, the parties must prove what it was there; and it is only in cases of uncertainty, as to the market there, that parties will be allowed to prove the market price elsewhere as approximate evidence of value. And besides, when parties are allowed to prove the market price elsewhere, it must be confined to what the market price was at the time in question, and not what it became a month or months afterward.

Campbell had been sworn as a witness for the defendant's, and on his direct examination had testified, that all of the cheese in question was made before the 8th of July, 1866.

That Faulkner had all the cheese made previous to that which was sold to the plaintiff, and that one Crist had the cheese immediately after that of the plaintiff during the month of July. And he testified that no sour curd was used till the last of July or in August. And that he discovered no sour curd; and that no bad cheese was made till August.

On his cross-examination, he testified that Crist purchased four cheeses at the factory which were made in the month of July, and not before the tenth of that month; and that one of those cheeses was sent back to the factory from New York by Crist.

The counsel for the plaintiff then asked the witness, "Was

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that a good or bad cheese?" and whether the defendants made an allowance to Crist on account of the bad quality of the cheese? The defendant's counsel objected to each of the questions as incompetent and immaterial. The court overruled the objections and admitted the testimony, and the witness answered that the center of the cheese was bad; and also that the defendants did make such allowance.

So too, against the objection of the defendants' counsel, and after the defendants had rested, Crist was called as a witness for the plaintiff, and testified that he had six large cheeses of the defendants; that he bought four of them, and took two on commission; that they were made in July, and that he took them in August; that he saw and examined the one of them that was sent back; that it was sent back to him, and that he took it to the factory; that it "was as bad a cheese as he ever saw, and smelt very offensively."

I have no doubt that all this testimony was competent. In order to rebut the proof which the plaintiff had given to show that the sour curd had not been fraudulently introduced into, and formed a part of the cheese, which had been sold to him, Campbell had been called, and one or two other witnesses on the part of the defence, to prove that there was no sour curd there, and that no bad cheese was made until August; and this testimony by Campbell himself, and by Crist, was properly introduced to show that the statement of Campbell, that no sour curd was used, and no poor cheese was made until August, could not be relied upon.

It was claimed on the part of the plaintiff, and the testimony of witnesses on his part tended to prove, that for the purpose of introducing the sour curd on hand into the center of the cheese Campbell had procured and used a tin hoop, by means of which a pan full of sour curd could be held in the center of the cheese and surrounded with sweet curd, while the cheese was being made up. So that when the cheese was manufactured the sour part of it would be surrounded on all sides by the pure curd. The defendants then proved by their cheese maker, who was the daughter or step-daughter

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of Campbell, that she had seen such a tin hoop used in a cheese factory in Rome and also in a factory at Wallsville, in Oneida county, and that the tin hoop used in the factory at Frankfort was procured at her suggestion.

When Crist was afterward examined, the plaintiffs asked him "What do you say as to the practice being prevalent of using a tin hoop to put cold curd into the center of a cheese?"

This was objected to by the defendant's counsel as incompetent and immaterial. The court admitted the evidence, and the defendant's counsel excepted. And the witness answered, "I have never heard of it until this case; this is the only instance that I ever knew or heard of its being tried; there are two modes of using cold curd left over. Some put it in the next day's curd and others press it and cap the cheese. They put it in the next day's curd by mixing it through, and do not put it in a lump together. I never heard of its being put in a lump in the center until I heard it here to-day."

I have no doubt that this testimony was competent. It was competent for the defendants to prove that such a hoop was and had been in use in other factories, and if this testimony had not been given in reply, the defendants might well have claimed that such hoops were in general and common use.

Other exceptions were taken during the trial, but no point is made on any of them before us. I have, however, examined them, and think that no error was committed by the judge.

The motion for a new trial should be denied and judgment should be entered upon the verdict for the plaintiff.

BACON and MORGAN, JJ., concurred.

Judgment accordingly.

FULTS v. WYNN.

CAROLINE FULTS, Administratrix, and DELOS MILLS, Administrator, &c., of LEWIS H. FULTS, deceased, Appellants, v. WILLIAM WYNN, Respondent.

(GENERAL TERM, FIFTH DISTRICT, OCTOBER, 1869.)

A notice of appeal from a judgment of a justice's court, which necessarily shows the respondent how the judgment should be more favorable to the appellant, and enables the former to make the offer permitted by section 371 of the Code, is sufficient, upon the question of costs, although it does not state, *in hæc verba*, that the judgment should have been "more favorable."

APPEAL from an order of the Lewis County Court, affirming the taxation of the costs of the respondent, in that court, and refusing to tax the costs of the appellants. The facts are stated in the opinion.

C. E. Stephens, for the appellants.

A. J. Mereness, for the respondent.

Present—BACON, FOSTER and MORGAN, JJ.

By the Court—FOSTER, J. Lewis H. FULTS commenced an action in a justice's court, in the county of Lewis, against William Wynn. An issue was joined and a trial had, which resulted in a judgment in favor of Wynn for one dollar of damages and \$6.60 costs. Conceiving himself aggrieved, Wynn appealed to the County Court of Lewis county, where two trials were had, in each of which the jury disagreed, and afterward Lewis H. FULTS died, and his administratrix and administrator, above named, continued the action in their names; and on a third trial, Wynn obtained a verdict against them for the sum of thirty dollars. Thereupon each party claimed costs of the other. The clerk taxed the costs of the defendant. The plaintiff appealed to the County Court,

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where the taxation was affirmed, and the taxation of the plaintiff's costs refused, and they appeal to this court.

By the return of the justice, it appeared that the defendant, Wynn, who was the appellant in the court below, served upon him a notice of his appeal, and which was annexed to the return, which stated, among other things, that: "5th. The judgment should, from the evidence, have been in favor of the defendant for \$150." And the defendant also claimed that the judgment should have been more favorable to him for the following reasons, viz.:

"1st. The judgment should have been for a larger amount in favor of defendant.

"2d. The judgment should have been in favor of defendant for at least \$150 damages."

It is claimed, on the part of the appellant, that the notice of appeal to the County Court, which was served on the plaintiff in the justice's court, was different from the one served on the justice. That that notice did not sufficiently state the grounds of appeal, to call upon the plaintiff to make an offer, and that the notice served on the party is the one by which the determination as to costs is to be controlled.

Upon the question whether a notice, like the one served upon the justice, was served on the plaintiff, the affidavits are conflicting, and there is no positive proof from any one that such notice was not served; while the defendant's affidavits are quite satisfactory in showing that it was. But I think that the notice which the appellant here claims was served on the plaintiff below, was sufficient to require him to make an offer, more favorable to the defendant than the judgment which he appealed from, if he would relieve himself from costs, in case the defendant should obtain a larger verdict in the County Court.

That notice did not use the terms "more favorable," but it stated that the judgment was rendered against the plaintiff for one dollar of damages and \$6.60 costs, and the fourth and fifth grounds of appeal were stated as follows:

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“4th. The evidence in the case showed that the plaintiff was indebted to the defendant in the sum of \$150.

“5th. The judgment should, from the evidence, have been in favor of the defendant for \$150.”

The court in this district has been very strict in requiring the appellant, in his notice of appeal from a justice's court, to state clearly *how* the judgment should be more favorable to him, if he would allege afterward that he was entitled to the costs of the appeal, and has required a more full and clear statement from him than is required in most of the other districts; but we have never decided that the words “more favorable” should be used in the notice, nor has such decision been made in any other district that we are aware of. Nor can it be necessary to insert such words. Both parties are aware of the amount of damages in the justice's court; and besides, in this case, the notice of appeal stated the amount, and when the notice of appeal also claimed that the judgment should have been for \$150 instead of one dollar, as it was, it necessarily informed the plaintiff that the claim was that it should be “more favorable” than it was; and it also informed him *how much* more favorable he claimed it should be. And it communicated to him all the real information which could be necessary to enable him to offer judgment for such sum as would, at least, equal in amount any verdict which the defendant might recover against him.

The defendant having stated in his notice that the judgment should have been for \$150 instead of the sum for which it had been rendered, it became the duty of the plaintiff unless he believed that on the appeal the damages could not be increased ten dollars, to make an offer. He omitted to make any offer. The damages in favor of the defendant were increased more than ten dollars, and he was clearly entitled to the costs of the appeal.

The order of the County Court affirming the taxation of costs by the clerk, should be affirmed with ten dollars costs.

BACON and MORGAN, JJ., concurred.

Judgment affirmed with costs.

Stevens v. Benton.

HENRY C. STEVENS, Respondent, v. SETH F. BENTON, Appellant.

(GENERAL TERM, FIFTH DISTRICT, OCTOBER, 1869.)

By taking his appeal from the judgment of a justice of the peace in form as for a new trial, the appellant does not waive the right to insist that an attachment, through which the justice took cognizance of the case, was void. Per FOSTER, J.

Or to raise in the appellate court as fully as he might if he had appealed on questions of law only, all questions properly raised in the court below, excepting those to proceedings which took place on the trial of the action. *Id.*

The affidavit presented to a justice of the peace under the act to abolish imprisonment for debt (1831, § 33), as the basis for a short attachment, need not state facts showing any fraudulent or improper act, as required in the affidavit on application for a long attachment. *Id.*

But quere, whether an objection that the affidavit does not state the facts which show that the claim is on contract, and which render a warrant impossible under section 30, is not available to the defendant. *Id.*

When it appears on the return of an attachment issued under section 33, that property has been attached, but that a copy of the inventory and attachment have not been personally served, the justice obtains no jurisdiction of the person until the return of a summons. (§ 38.) *Id.*

If therefore, the defendant appears on return of the summons, joins issue, &c., without objecting to the sufficiency of the affidavit upon which the attachment issued, he waives an irregularity in that respect; and this is so, although he appeared specially for the purpose and took the objection on return of the attachment. *Id.*

The plaintiff in an action to recover for his services under an agreement, to remunerate and board him in consideration thereof, may show the value of his services with or over and above board, by the testimony of a witness who has had no knowledge of the value of the board furnished. *Id.*

He may not show the compensation paid him for like services by a former employer in whose service he had been, directly before the services in question, and who had taken him into employment after a prior engagement with the defendant.

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APPEAL from an order of the County Court of Oneida county, denying a new trial. The material facts are stated in the opinion.

J. D. Kernan, for the appellant.

S. J. Burrows, for the respondent.

Present—BACON, FOSTER, MORGAN and MULLEN, JJ.

By the Court.—FOSTER, J. On the 17th day of June, 1868, the plaintiff appeared before Dexter Gilmore, a justice of the peace of the county of Oneida, and made oath in writing that Seth F. Benton was justly indebted to him on a demand, arising on contract, in the sum of \$200 over and above all discounts, &c. That Benton was not a resident of the county of Oneida “*and that no warrant can issue against him on the demand of this deponent, according to the act to abolish imprisonment for debt and to punish fraudulent debtors.*” He also gave bail pursuant to the said act, and demanded that an attachment be issued.

The justice thereupon issued a short attachment in the usual form, returnable before him on the 19th day of the same month.

On the 17th day of June the constable levied the attachment on certain personal property of the defendant in the possession of one Battey, and served a copy of the attachment and inventory of the property on Battey, as appeared by his return; and he further returned to the attachment, that he did not find the defendant in the county, but that he was absent therefrom; and that he had no residence therein.

At the time and place mentioned for the return of the attachment, the parties were called by the justice, and the plaintiff appeared in person, and by his attorney; and the defendant appeared by William P. Battey, *for the purpose of making objection to the process*; and was sworn as to his authority. And he objected to the attachment on the ground, that the affidavit on which it issued was insufficient,

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and the attachment wrongfully issued. The justice overruled the objection. The counsel for the defendant declined to appear and answer generally, and the justice issued a short summons returnable on the 22d of June. The constable returned the summons, with his return thereon, by which it appeared, that after diligent search, the defendant could not be found in the county, and had no residence therein.

On the 22d of June both parties appeared, and the plaintiff claimed against the defendant in writing for work, labor, and services, done and performed for him by the plaintiff, and demanded judgment in the sum of \$200.

The defendant answered in writing, denying the complaint and claiming that the work, labor and services were performed by the plaintiff under a special contract for a specified sum. That the whole amount had been paid to him, and that there was a balance due to the defendant of five dollars and sixty-four cents, which he claimed to recoup; but no objection was then taken to the sufficiency of the affidavit on which the attachment was issued, nor was any such objection afterward made in the justice's court.

The action was afterward tried before the justice and a jury, and a verdict was rendered in favor of the plaintiff for \$126.25, for which judgment was rendered with costs.

The defendant appealed to the County Court, and in his notice of appeal desired a new trial in that court, and stated as grounds of appeal that the judgment was contrary to the law and evidence of the case. That the justice erred in refusing to nonsuit the plaintiff and in the admission of evidence, and that the judgment should have been more favorable to the defendant.

In the County Court, when the case was called for trial, the counsel for the defendant moved that the judgment of the justice be reversed, on the ground that the affidavit on which the attachment issued was insufficient, and that it did not sufficiently set forth the facts and circumstances upon which the application therefor was founded, and that in addition to

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the facts and circumstances set forth, it should have set forth facts and circumstances which would have entitled the plaintiff to a long attachment had the defendant been a resident of the county. The counsel for the plaintiff objected to the motion upon the ground that it had been waived by appealing for a new trial; that the affidavit cannot be returned by the justice, and, if returned, it is unofficial, and this court cannot act upon it; and that by appealing for a new trial, the defendant waived all objection to the sufficiency of the affidavit upon which the attachment issued, and was estopped from raising the question at that time in that court.

The court denied the motion, and the defendant's counsel excepted.

It is quite clear that the County Court, in denying the motion of the defendant's counsel, did not do so because the notice of appeal called for a new trial, for it had just before decided to entertain the motion, and in doing so had overruled precisely the same objections of the plaintiff's counsel, as those above stated, and I have no doubt that in overruling the objections of the plaintiff's counsel the court was correct. The statute authorizes a party to a judgment in a justice's court to appeal to the County Court upon questions of law *only*, in which case no retrial is had; but the questions of law are to be decided upon the evidence and proceedings had before the justice, as returned by him, or he may appeal for a new trial; in which case the justice does not return the testimony taken before him, but returns "the process by which the action was commenced, with the proof of service thereof and the pleadings or copies thereof, the *proceedings* and judgment, together with a brief statement of the amount and nature of the claims litigated," while on an appeal on questions of *law only* the justice returns the testimony, *proceedings* and judgment. (Code of Procedure, § 360.)

I think it is clear, that where a party appeals from a justice's judgment for a new trial, he can, in the appellate court, raise all questions which were properly raised in the court below (except such as were raised to proceedings which

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took place on the *trial* of the action), as fully as he could do if the appeal were on questions of law only. The return of the justice in such case, as we have seen, is quite as ample, except in regard to the testimony, as in the case of appeal on questions of law. Indeed, unless the word "proceedings" covers everything that took place in the court below, except "testimony" and "judgment," the return, in case a new trial is asked for, is more comprehensive; for it contains in terms all that is provided for in a return on an appeal on questions of law only, and also the "process," "proofs of service," and "pleadings." And yet I have no doubt that all these are covered by the word "proceedings;" and that the return in both classes of appeals is to be the same, except as to the testimony and rulings upon the trial. The reason for the determination, by the appellate court, of all questions of jurisdiction, and of regularity, which arose in the court below, is the same in both classes of appeals. And, if all such questions do not come up before the appellate court, on an appeal for a new trial, the aggrieved party must either bring two distinct appeals from the same judgment, which surely cannot be done, or else the statute does not give the party an opportunity in the court above to re-try all the questions which arose in the justices' court.

We do not know why the County Court denied the motion to reverse the judgment; but it must have been either because it thought the affidavit on which the attachment was founded was insufficient, or that the question was not properly raised before the justice.

If the question were before us for adjudication, I should have no hesitation in saying that the affidavit on which the attachment was issued was defective, and did not give the justice jurisdiction to issue it. Not, however, for one of the reasons stated by the defendant's counsel, that it did not state facts, which, as against a resident defendant, would have authorized the issuing of a long attachment, for this proceeding was under the act of 1831, and did not, as against a non-resident, require proof of any fraudulent or improper act on

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the part of the defendant to entitle the plaintiff to the attachment, but only that the demand arose on contract, that the defendant was not a resident of the county, and that no warrant under that act could issue against him; but I should hold it to be so, because there were no facts or circumstances set forth to show that the demand was such, that under the act in question, no warrant could be issued against him. No fact or circumstance appeared in the affidavit, from which it could be inferred that a warrant could not issue, except that the demand arose on contract, and yet in many cases of demands, a warrant may issue under the act of 1831, although it arose on contract.

The affidavit should have shown how it arose on contract, so that the justice could judge whether a warrant could issue or not, but as it was, the plaintiff swore to the law instead of the facts. Several authorities are cited on this question and the result of them all I think supports the view which I have taken of it, but I need not cite them, for in my judgment, no such question was in the case.*

When the question was raised before the justice, there had been no service of the attachment, even admitting that it had been regularly issued, which would of itself give the justice jurisdiction of the parties.

The thirty-seventh section of the act in question provides that if the attachment shall be returned personally served on the defendant, the justice shall on the return day, proceed to hear, &c.

* By section 33 of the non-imprisonment act (Laws 1831, ch. 300), an attachment may issue against a non-resident defendant, whenever no warrant can issue under the 30th section of the same act; and the 30th section authorizes a warrant only in cases of (1) money collected by a public officer, (2) official misconduct or neglect of duty; (3) misconduct or neglect in any professional employment. In *Williams v. Barnaman* (19 Abb., 69), it was decided that an affidavit that defendants were indebted to plaintiff on a demand arising upon keeping their horses, was sufficient to show that the action was one "arising upon contract express or implied." And, *quere*, if in the affidavit in this case, it had been stated that the action arose on contract for services by plaintiff or for services as bar-keeper, such statement would not have been sufficient to negative any presumption that the case might be one in which a warrant could issue under section 30. [REP.]

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The thirty-eighth section provides, that if at the return day it shall appear by the return, that property was attached, and that a copy of the inventory and attachment was not personally served, and the defendant shall not appear, the plaintiff may take out a summons against the defendant, and if such summons shall be returned, that the defendant cannot be found after diligent inquiry, or that the same has been personally served upon the defendant, then, in either case, the justice shall proceed to hear, &c., as upon a summons returned personally served.

The objection to the sufficiency of the affidavit was taken on the return of the attachment not personally served.

The statute which I have set out authorized the justice to thereon proceed and hear the case if the defendant appeared, and by appearance the statute meant a general appearance, for without *such* appearance no jurisdiction was acquired. And without such an appearance the defendant had no standing in the court any more than he had at any time after the issuing of the attachment and before the return thereof. And the justice could not take jurisdiction to decide any question between the parties unless the defendant appeared in such manner as to confer jurisdiction. And if the defendant did not so appear, the only thing which the justice could do, as such, was to issue a summons in pursuance of the thirty-eighth section of the act. It is only upon the return of process which purports to confer jurisdiction, that the defendant can appear specially and object to the regularity of the process.

In my judgment, the only time when the defendant could appear specially and object to the regularity of the attachment proceedings was on the return of the summons, and he could then have claimed that the attachment was irregular, and that jurisdiction was not conferred over him. This he did not do, but he appeared then generally, and he voluntarily joined issue in the action upon the merits. If the objection in question had been taken then and overruled, his immediately thereafter joining issue upon the merits would not deprive him of the right to renew the objection in the

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County Court, and also here. He did not do so, but chose to raise it at a time and in a way which did not legally authorize the justice to pass upon it. And for aught that appears, the justice may have overruled his objection for the reason, that he had not then the right to determine the question. At all events, he should have raised the question on the return of the summons, and by joining issue then without objection, he conferred jurisdiction, if without that, it had not been previously acquired.

A jury was impaneled, and on the trial it appeared that the plaintiff had been employed by the defendant as a bartender at his saloon and eating house, that he had acted as such for about fifteen months, and that while he was so employed the defendant boarded him. Several witnesses were asked by the plaintiff's counsel "how much were the services of the plaintiff worth with board?" Others were asked, "How much were his services worth over his board?" All of which were objected to as incompetent evidence, unless the witnesses were competent to speak of the value of his board. All the objections were overruled, and the defendant's counsel excepted, and most of the witnesses answered forty dollars per month. One answered fifty dollars; and most of them stated that, without board, his services would be worth fifty dollars or upward per month. It is supposed, by the defendant's counsel, upon the authority of *Lewis v. Trickey* (20 Barb., 387), that the court below erred in admitting the testimony so objected to. In that case the action was brought to recover for the services of the plaintiff, who was an infant, and was in the employ of the defendant, for several years, during which time, the defendant boarded and clothed him, and for a portion of the time sent him to school, and paid for his tuition; and the question really was, whether witnesses for the defendant could be allowed without any knowledge, so far as appeared, of the expense of the board, clothing, schooling, or loss of time of the plaintiff, while so attending school, to tell, in gross, what the services of the plaintiff were worth per year, or during the whole time that he was in the

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defendant's employment, over and above such board, clothing and tuition. There is some uncertainty as to the precise questions before the court in that case.

In the statement of the case, it appears that the questions were: "What, in your opinion, were the services of the plaintiff worth to the defendant the first year, *under the circumstances he was placed in*, besides his board? And, "What, in your opinion, were his services worth, over and above his board, during the whole time the plaintiff was with the defendant?" But JOHNSON, J., in delivering the opinion of the court, at page 391, says: "The defendant offered to prove by his witnesses what the plaintiff's services were worth, over and above his board, clothing, and schooling, furnished by the defendant, without proving or offering to prove that the witnesses knew the quantity or value of either item, assumed by the question to have been furnished."

In that case the plaintiff was allowed, against objection, to ask a witness "what were the services worth, in your judgment;" and the witness answered, "I should think his services were worth about twelve dollars for the last two years he worked there, for the third year about ten dollars per month, and for the first and second years about eight dollars per month." And this necessarily included his board. And the witness was understood to answer that those were the valuations for his services over and above his board. And the Supreme Court affirmed the decision of the referees who tried the cause.

I do not perceive any essential difference between the questions presented here and that presented in the case referred to. Here, to be sure, the words "over and above" or "with board" are expressed in the question.

There they were implied, but the substance was the same and called for the same answer.

If a person hired another by the month to labor for him and to be boarded in his family without any specified price to be paid for the labor, would he be allowed to diminish the price which he was to receive below the ordinary price of

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such labor by proving that he furnished him with better board than was usually furnished to such laborers, or would the employe be allowed to enhance the price per month by proving that his fare was below that usually furnished in such cases?

It seems to me that the words "with board" and "over and above board," used in the case, tended to simplify the question and render more clear the answer which should be given, and that the ruling of the court below in that respect was correct.

It appeared that the plaintiff had worked for the defendant in the same business before the time in question, and that after the plaintiff left the defendant's employ last before the time in question, he worked for one Griffin in a like employment, and the plaintiff's counsel asked one of his witnesses: "What was plaintiff receiving from Griffin?" This was objected to by defendant's counsel as an improper mode of proving damages. The court admitted the testimony, and defendant's counsel excepted, and the witness answered: "He was receiving eleven dollars per week and dinner," &c. This evidence, I think, was clearly incompetent. If it was for the purpose of showing that to be a fair value of the services of the plaintiff while in the employ of the defendant, it was improper; and if it was designed to show that it afforded evidence that the defendant must have agreed to pay the plaintiff as much as that, it was equally improper. In the conflict of testimony upon the question of the value of the services, it is impossible to say that it did not affect the result. Indeed, it would seem that it did, for after the jury had retired they in a short time returned into court and requested the court to instruct them "as to whether the plaintiff left Griffin's to commence the services in question for the defendant?" And the court thereupon read to them from his minutes the evidence relating thereto. I think for this error alone a new trial should be granted, costs to abide the event.

All concurring in the conclusion.

New trial ordered.

 Northup v. Railway Passenger Assurance Company.

GEORGE NORTHUP, Administrator, &c. of LUCILLA NORTHUP, deceased, v. THE RAILWAY PASSENGER ASSURANCE COMPANY.

(GENERAL TERM, SEVENTH DISTRICT, DECEMBER, 1869.)

An insurance against "any accident while traveling by public or private conveyances provided for transportation of passengers," held not to cover accident to the insured while he is going on foot over the customary route between a steamboat landing where conveyances are to be had for hire, and a railway station, in the prosecution of, and for the purpose of continuing by rail, the journey with reference to which the insurance was taken.

This case was submitted under the Code, section 372.

The plaintiff claimed to recover for the death of his intestate, against the defendant, a corporation organized under the laws of Connecticut, having authority to insure against death and accident, and upon an insurance policy as follows, viz. :

Railway Passengers Assurance Co. of Hartford, Conn.		
STATION No. 865.		
R. P. A. Co., 1868. 9 A. M 30th Dec Station 865.	This Ticket will be good for ONE DAY, commencing with date. <div style="text-align: center; font-family: cursive; font-size: 1.2em; margin: 10px 0;"> <i>H. T. Sperry, Secy.</i> </div> <hr style="border: 0; border-top: 1px solid black;"/> <div style="display: flex; justify-content: space-between;"> FORM NOT TRANSFERABLE. </div> <div style="display: flex; justify-content: space-between;"> 1A Twenty Cents. </div>	<div style="font-size: 2em; line-height: 1;">13</div>

\$5,000.

The RAILWAY PASSENGERS ASSURANCE COMPANY, of Hartford, Conn., will pay the owner of this Ticket TWENTY-FIVE DOLLARS PER WEEK, in case of personal injury causing total disability, for a period not exceeding TWENTY-SIX WEEKS, or the sum of FIVE THOUSAND DOLLARS to his legal representatives, in the event of DEATH, from personal injury, ensuing within THREE MONTHS from the happening thereof, when caused by

Any Accident while Traveling

by public or private conveyances provided for the transportation of Passengers in the United States or British North American Possessions, it being understood that this Policy covers no description of War Risk.

Insurance on any one life is limited to \$10,000; and no person holding more than two tickets will be entitled to receive in excess of that sum, or proportionate compensation.

J. G. BATTERSON, *President.*

As a means of identification, in case of fatal accident, the Assured is desired to write his name and residence below.

Name..... Mrs. GEO. NORTHUP,

Residence Rathboneville.

Northup v. Railway Passenger Assurance Company.

D. Rumsey, for the plaintiff.

W. F. Cogswell, for the defendant.

Present—JOHNSON, DWIGHT and J. C. SMITH, JJ.

By the Court—JAMES C. SMITH, J. By the terms of the contract in this case, the defendant undertook to insure the plaintiff against personal injury “caused by any accident while traveling by public or private conveyance provided for the transportation of passengers,” &c.

The contract was expressed in an insurance policy or ticket, which was issued to the plaintiff, by the agent of the defendant, at Rathbone, Steuben county, and which the plaintiff procured with the intent of setting out on the same day, to travel by public conveyance to the county of Madison.

Immediately after procuring the ticket, the plaintiff entered upon the intended journey, in company with her husband and others, and the party traveled by cars on the Erie railway to Elmira, and thence by cars on the Canandaigua and Elmira road to Watkins at the head of Seneca Lake. From Watkins they went by steamboat on said lake to Geneva, where they arrived about eight o'clock in the evening. On landing at the steamboat wharf, the party started on foot, to go to the station of the New York Central Railroad Company, about seventy rods from the wharf, in further prosecution of their journey, and on the way from the wharf to the station, the plaintiff's intestate slipped and fell upon the sidewalk, and thereby received injuries of which she died in a few days.

It appears from the statement of facts submitted to the court, that persons arriving on the steamboat generally pass from the wharf to the railroad station through the public streets of Geneva; and that upon the arrival of the steamboat, on the occasion above referred to, there were public hacks for hire at the wharf, for the purpose of conveying passengers, if hired to do so, to any part of said village, or to the railroad station.

Northup v. Railway Passenger Assurance Company.

Without undertaking to lay down any general rule, or to do anything more than to decide the particular case before us, we are of opinion, upon the facts submitted, that the accident referred to was not within the terms of the policy. True, the accident occurred to the plaintiff "while traveling," and that too, while traveling on the very journey which she had in view when she procured the ticket; but at the time when the accident occurred, the plaintiff was not traveling by any "public or private conveyance for the transportation of passengers," but was voluntarily pursuing her journey on foot, although there were conveyances at hand, which she might have employed, if she had chosen to do so. The defendant insured only against the perils of traveling by *conveyance*; and if the plaintiff had gone "by conveyance" from the wharf to the station, the accident in question could not have occurred.

The counsel for the plaintiff argues that the risk assumed by the defendant, is not confined to accidents occurring during the very act of riding, but that it covers every accident happening while doing any act necessary or proper to be done, during the making of the journey, including in the present case, the passing from the steamboat wharf to the railroad station, in any usual and proper mode. Accidents may be supposed, which though not occurring in the very act of riding in a conveyance, would be covered by the defendant's contract. The case of *Theobald v. Railway Passengers Assurance Company* (26 Eng. L. & Eq. R., 432), cited by the plaintiff's counsel, presents an instance of that kind. In that case, the train had stopped at a station where a change of cars took place, and the plaintiff, while stepping out of the car, met with an injury without any negligence on his part, and in consequence of the step of the car being accidentally slippery. There, as was said by Pollock, C. B., "though, at the time of the accident, the plaintiff's journey had in one sense terminated by the carriage having stopped, he had not ceased to be connected with the carriage, for he was still on it. The accident also happened

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without negligence on his part, and while doing an act, which as a passenger, he must necessarily have done, for a passenger must get into the carriage and get out of it when the journey is at an end, and cannot be considered as disconnected from the machinery of motion until the time he has, as it were, safely landed from the carriage and got upon the platform. The accident is attributable to his being a passenger on the railway, and it arises out of an act immediately connected with his being such a passenger." The policy in that case insured against injuries "happening to the assured from railway accidents whilst traveling in any class carriage on any line of railway," &c., and it was held that the accident was within the meaning of the policy. But that case does not go to the extent of holding that the policy covered every accident happening to the assured while doing any act necessary or proper to be done, during the making of the journey.

The distinction between that case and the one before us, is obvious. There, the assured was injured while yet on the carriage in which he had made his journey, and while in the act of getting out of it, which, as a passenger, he must necessarily have done. Here, the assured when injured, was not in, on, or in any way connected with any conveyance, and she was pursuing a part of her journey on foot, she having voluntarily chosen to walk, in preference to taking a carriage.

Judgment should be given for the defendant.

Judgment for defendant.

CHARLES H. WILLIAMS and others, v. THE CITY OF ROCHESTER
and others.

(GENERAL TERM, SEVENTH DISTRICT, DECEMBER, 1869.)

A case for submission, under section 372 of the Code, must present an actual controversy for adjudication between the parties, and also indicate the judgment desired, or it will be dismissed.

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THE facts appear in the opinion of the court.

E. A. Raymond, for the plaintiff.

A. G. Wheeler, for the defendant.

Present—JOHNSON, J. C. SMITH and DWIGHT, JJ.

By the Court—DWIGHT, J. This purports to be a submission of a controversy, without action, under section 372 of the Code of Procedure. But the parties have apparently mistaken the province and purpose of that provision of law. Its object is to enable parties, without resort to legal process or formal pleadings, to submit to the court, for its adjudication, some alleged cause of action or claim for relief. The submission must be for an adjudication. A case must be presented in which a judgment may be rendered in favor of one and against the other of the parties to the submission; and the case must indicate what judgment is asked for.

This is not such a case. A statement of facts is presented, agreed upon between the parties, and then three questions are propounded, to be answered categorically by the court.

No judgment for relief is asked for, nor does it appear that any controversy exists between the parties beyond a difference of opinion upon the questions propounded to the court.

The facts stated are such as tend to make out a cause of action in favor of the plaintiff, against some of the defendants, for trespass; they might, also, be possibly made the basis of a demand for equitable relief, in the nature of an injunction. But the question is not submitted whether the plaintiffs are entitled to a judgment for damages, nor whether any threatened action on the part of the defendants should be restrained by injunction.

It is impossible for the court to render any judgment upon such a submission.

The case must be dismissed, without costs to either party.
All concur. Case dismissed.

Sharp v. Freeman.

CHOLETTE SHARP, Appellant, v. BENJ. F. FREEMAN and others, Respondents.

(GENERAL TERM, SEVENTH DISTRICT, DECEMBER, 1869.)

In an action brought to set aside the deed of a deceased grantor, as fraudulent against his creditors, with a view to a subsequent application to the surrogate for sale thereof under section 72, chap. 460, Laws of 1837, which, as amended in 1843 (chap. 172), renders a judgment upon the merits against administrators, &c., *prima facie* evidence of indebtedness upon the application.—*Held*, that the plaintiff did not sustain his complaint by simply showing a judgment in his favor against the grantor's administrator.

APPEAL from a judgment entered on the report of a referee in favor of the defendants. The facts are stated in the opinion of the court.

E. G. Lapham, for the appellant.

W. C. Rowley, for the respondents.

Present—JOHNSON, J. C. SMITH and DWIGHT, JJ.

By the Court—DWIGHT, J. This was an action to set aside a deed executed by Alvah H. Parks, deceased, in his lifetime, on the ground that it was executed in fraud of creditors of the deceased, of whom the plaintiff was alleged to be one. He seeks to have the deed set aside as an impediment to proceedings before the surrogate to obtain an order for the sale or mortgaging of the real estate of the deceased to pay his debts.

Upon the trial the plaintiff introduced in evidence, under the defendant's objection, the record of a judgment recovered by the plaintiff against the administrators of the deceased upon claims existing at the time of the death of the intestate which had been referred by consent of the parties and the approval of the surrogate, in pursuance of the statute, and upon which judgment payments had been made by the admin-

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istrators in the course of administration. No other evidence of the alleged indebtedness was given.

The referee held: 1st. That the judgment did not establish the fact of indebtedness as against the parties defendant to this action; and, 2d. That if it did establish the fact that an indebtedness had existed, it did not change its character from that of a simple contract debt, and that such debt was barred by the statute of limitations. If either of these conclusions were correct the plaintiff's complaint was properly dismissed. I am of opinion, that the referee was right in the first of the conclusions stated. The judgment introduced in evidence and relied upon to prove the indebtedness of the deceased to the plaintiff, was merely a judgment against his administrators.

Aside from the amendment of 1843, hereafter noticed, the uniform tenor and purpose of the statutes in respect to judgments of this character is to restrict their effect to the establishment of claims collectible out of assets in the hands of the personal representatives in the course of administration.

Such a judgment does not establish a lien upon the real estate of the deceased. (2 R. S., 449, § 12.)

At common law and in equity it was not evidence against his heirs or devisees. (*Osgood v. Manhattan Co.*, 3 Cow., 612; *Baker v. Kingsland*, 10 Paige, 366.) Previous to the amendment of 1843 it was not even admissible in evidence, in proceedings before the surrogate, to obtain an order for the mortgage, lease or sale of real estate. The act of 1837 (Laws of 1837, chap. 460, § 72) so declared.

The amendment of 1843 provided that such judgment obtained upon a trial on the merits should be *prima facie* evidence of the debt before the surrogate; but it went no further, and upon no principle can the effect of this provision be extended to render such judgment evidence in an action like the present.

In the case of *Loomis v. Tift et al.* (16 Barb., 541), cited by counsel for the appellant as authority for the bringing of this action in aid of the proceedings before the surrogate, and

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which was an action of precisely this character, it was objected on the part of the defendant that no judgment had been obtained against the deceased or his personal representatives. The court held that the objection was not well taken, and they say, in an opinion by Mr. Justice ALLEN: "A judgment recovered against the administrator would not be evidence for any purpose against the parties to this action. It would not be *prima facie* evidence of the plaintiff's debt."

Such, I think, both upon principle and authority, must be the rule; and hence the referee was right in refusing to regard the judgment as any evidence of the debt alleged by the plaintiff. The fact that the defendant in this action, Susan Parks, was one of the administrators, and as such a defendant in the proceeding, by reference, in which the plaintiff's judgment was obtained, cannot affect the decision of this question. In that proceeding she was made a party, and the judgment was obtained against her simply in her representative capacity, and her personal interest in the real estate, sought to be reached in this action, could not be affected by that judgment otherwise than that of her co-grantors.

I am also of opinion that the second of the referee's conclusions of law, above stated, was correct, viz: That the plaintiff's debt, if proved by the judgment, was barred by the statute of limitations; but if right in any views upon the first question, it is unnecessary to examine the second. The judgment should be affirmed with costs.

All concurring, judgment affirmed.

SYLVESTER GRAY and others, Administrators, &c., Appellants, v. JOHN M. GRAY, Respondent.

(GENERAL TERM, SEVENTH DISTRICT, DECEMBER, 1869.)

Where a promissory note is found in the maker's hands, canceled, his indebtedness thereon is presumptively discharged, and proof that no payment has been made, nor offset surrendered in respect thereof, does not destroy the presumption.

Gray v. Gray.

APPEAL from a judgment entered on the report of a referee, in favor of the defendant. The facts are stated in the opinion of the court.

A. J. Abbott, for the appellant.

McNeil Seymour, for the respondent.

Present—JOHNSON, J. C. SMITH and DWIGHT, JJ.

By the Court—DWIGHT, J. The plaintiffs as administrators of John Gray, deceased, sued on a note alleged to be lost, made by the defendant, who was a son of the intestate, to the intestate in his lifetime. On the trial, the defendant produced the note with his name torn off, and testified that he had it in his possession before the death of his father. It appeared in evidence that the defendant lived in the same house with his father at the time of the death of the latter, and that upon one occasion, after his father's death, he had the key to the desk in which the note was kept; but he and his brother, who was with him at the time, testified that he did not take the note from the desk. It also appeared by his own evidence, that he had never paid the note; and that at the time when it came into his possession, the intestate was not indebted to him in any sum.

The referee found as a fact, that the note had not been paid nor satisfied by offset, but as conclusion of law, that the possession of it by the maker was presumptive evidence that it had been discharged. And the defendant had judgment, from which the plaintiffs appeal, on the ground that the referee erred in the conclusion of law above stated. They urge that possession of the note by the maker was presumptive evidence of payment only, and that, the presumption of payment being repelled, the burden of proof was upon the defendant, to show that the obligation had been otherwise discharged or acquitted.

But such, I do not find to be the law. Pothier in his

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work on obligations (Poth. on Obl., No. 573), refers to precisely the distinction here sought to be established, and concludes that it was not sound; but, on the contrary, that "it ought to be decided generally from the possession of the debtor, that the creditor shall be presumed to have given up the security, either as acquitted or released, until the creditor shows the contrary; as, for instance, that it has been taken surreptitiously." He says further: "There is sufficient ground to presume a donation and release of the debt when the creditor gives up the security, and the circumstance of the security being in the possession of the debtor is a sufficient reason for presuming that the creditor has given it up; as that is the most natural way of the possession passing from the one to the other." See also Cowen & Hill's Notes to Phil. on Evidence, note 192, and the cases there cited, where it is said: "If a promissory note or bond should chance to be found in the hands of the debtor, or if it be crossed, rased or torn in pieces, either of these circumstances will create a presumption that it has been acquitted; which presumption will remain until clear proof be brought that the debt is still owing; as that the appearances came by violence or accident." (See also Parsons on Notes and Bills, 235 and 236.)

In this case, both circumstances concur. The note is found in the hands of the maker, and it is canceled by the removal of the maker's name. These circumstances could not lawfully exist without the act or consent of the holder of the note; and that they occurred unlawfully will certainly not be presumed.

If any presumption against the *bona fides* of the defendant's possession of the note could arise from the fact that he had access to the desk in which the note was kept, it was fully repelled by his affirmative evidence that he did not take the note therefrom.

The burden of proof was clearly upon the plaintiffs to show that the defendant did not come honestly by the possession of the note, and that it was not canceled by, or with the consent of the holder; and in the absence of such proof the

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defendant is entitled to the benefit of the presumption raised by the facts of such possession and cancellation, viz.: That the debt had been released or acquitted.

The judgment must be affirmed with costs. All concurring
Judgment affirmed.

HENRY L. FISH and others, Respondents, v. BRACKETT H. CLARK, Appellant, impleaded with JAMES CAMPBELL.

(GENERAL TERM, SEVENTH DISTRICT, DECEMBER, 1869.)

The defendant, who owned and kept for the convenience of his business as a manufacturer of staves, a canal boat, suitably manned and equipped, received from the plaintiffs, who were common carriers, a cargo of the merchandise of their shippers indifferently, and undertook its transportation on such boat to a point on their route of business, for the usual rates of charge, to be collected and paid over by the plaintiffs, less a commission retained.—*Held*, that he was not liable to the plaintiffs as a common carrier, although he had applied for the cargo, knowing the general ownership it must have, and a year previously had made with them and performed a similar contract.

THIS action was brought to charge the defendants with liability for the loss and damage of merchandise, while *in transitu*, on their boat upon the canal between Rochester and Albany.

The plaintiffs were extensively engaged, under the style of "The Rochester Transportation Co.," as common carriers of merchandise upon the canal and river between Buffalo, New York and intermediate places, having a warehouse and office in Rochester. and an office at New York. In their business they generally used their own boats, but, on occasion, carried on those of other owners; and, in the latter case, were accustomed to ship in their own names, collect the freight charges at the places of destination, and, after deducting a commission, to pay over the balance to the owner of the boats.

The defendants were the owners in common of a canal

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boat, which was kept for use in the business of each of them, the defendant Clark being a manufacturer of staves, and the defendant Campbell a cooper. Some time in the year 1863, while the defendants so owned it, the boat had been employed in the transportation of a load of merchandise from Rochester to New York, furnished by the plaintiffs through an arrangement with Clark, which was in accordance with that usually made by them with boat owners, as before stated; and in May, 1864, the boat not being needed in the business of either of the defendants, Clark, knowing the character of the defendants' business, applied to them for a cargo for transportation from Rochester to New York, expecting to receive, as he did, in fact, the goods of individuals indiscriminately; and thereupon, the cargo in question, consisting principally of flour and potatoes, belonging to various owners unknown to defendants, and being in the plaintiffs' charge for transportation, was loaded upon the defendants' boat, in part at the warehouse of the plaintiffs, and in part at the premises of one Whitney, with the understanding that the defendants should receive the price paid by the shippers for freight, which was to be at the ruling prices, and collected by the plaintiffs and paid to the defendants, after deducting advances and four per cent commissions.

The captain and crew were provided by the defendants, and were subject to their orders; and the shipping bills were signed by the captain, to whom the plaintiffs made advances for expenses of tolls and towing, and they (the plaintiffs) also procured an insurance upon the cargo.

The boat met with accident on its way, on account of which, without negligence or fault of the defendants or the boat's crew, the boat and cargo were badly injured, and the latter partially lost; the remainder was sold by direction of plaintiffs and their insurers, who paid the insurance to the plaintiffs, and the plaintiffs paid the shippers the value of their property.

The defendant, Campbell, had no part in making the contract, and no knowledge of it.

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The case was referred, and a report was made dismissing the complaint against the defendant Campbell, but in favor of the plaintiffs as against the defendant Clark, who was charged with the liability of a common carrier; and this appeal was taken by him from the judgment upon a case and exceptions.

John McConnell, for the appellant.

Edward Harris, for the respondents.

Present—JOHNSON, J. C. SMITH and DWIGHT, JJ.

DWIGHT, J. The findings of the referee expressly absolve the defendant, Clark, from liability except as a common carrier, but charge him as such.

In his opinion the referee expresses very great doubt whether a recovery in the case can be sustained, and states that for the purposes of his report he adopts the conclusion which charges the defendant in order that if it should be held upon review that the defendant was chargeable, the necessity of a new trial might be obviated. I think it clear that the conclusion cannot be sustained.

According to all the authorities it is an essential characteristic of the common carrier that he hold himself out as such to the world; that he undertake generally, and for all persons indifferently, to carry goods, and deliver them for hire, and that his public profession of his employment be such that if he refuse without some just ground to carry goods for any one in the course of his employment and for a reasonable and customary price, he is liable to an action.

Such is the rule laid down by all the elementary writers, and sustained by the authorities cited by them. (See 3 Kent's Com., 597; Story on Bail, § 495; 2 Parsons on Cont., 166, note; Angell on Com. Car., § 46.)

The latter writer finds, as he thinks, some discrepancy in the authorities and cites some cases decided in sister States as

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tending to enlarge the rule and impose the liability of common carriers upon persons exercising that employment only occasionally and incidentally, and it is upon the authority of these cases, or rather upon the summary of them given by Mr Angell, that the referee bases his conclusion in this case.

So far as I have been able to examine the cases thus cited and referred to, I do not find that they go to establish a rule essentially different from that above quoted.

The parties held liable as common carriers in those cases seem generally to have been persons who, though not pursuing the business constantly or exclusively, have yet occasionally held themselves out as common carriers, and at such times have assumed that character and subjected themselves to its liabilities.

In the case of *Allen v. Sackrider* (37 N. Y., 341), the rule substantially as stated above, is quoted from various authorities and approved. Mr. Justice PARKER, writing the opinion of the court, says: "The employment of a common carrier is a public one, and he assumes a public duty, and is bound to receive and carry the goods of any one who offers;" and in that immediate connection he quotes from Prof. Parsons: "On the whole it seems to be clear that no one can be considered as a common carrier unless he has in some way held himself out to the public as a carrier in such a manner as to render him liable to an action if he should refuse to carry for any one who wished to employ him."

If this test be applied to the case now under consideration we find that the defendant, Clark, was not a common carrier. He was a manufacturer of staves, and Campbell, his co-defendant, was a manufacturer of barrels. They were joint owners of a canal boat and employed it in their own business, viz., the transportation of their own materials and manufactures. On one occasion only, before the present, so far as the proof shows, or as the referee finds, had the boat ever been employed in any other manner, and that was in the previous year, upon an arrangement with the same parties as in this case; the plaintiffs in this action, to carry a

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load of produce for them from Rochester to New York. There was no proof that the defendants or either of them had ever upon any other occasion offered to carry the goods of any person, and so far was the employment in these instances from being a public employment that, as the referee finds, the defendant, Campbell, part owner of the boat, did not know of the transaction ; and as to him the complaint was dismissed for that reason. It is very clear that the defendant, Clark, did not hold himself out to the public to carry the goods of any person who chose to employ him. The fact that the plaintiffs were common carriers, and that the property with which the defendants' boat was loaded was the property of various persons, and of all such persons as chose to employ the plaintiffs to transport it for them does not, as it seems to me, affect the question of the character of the defendant's employment. He undertook with the plaintiffs to carry such a load as they should furnish him. There was no privity between him and the owners of the property transported. As to him, the cargo was the property of the plaintiffs, and the "going rates" of freight was adopted as the measure of the compensation to be paid the defendant for his carriage. This was to be paid him by the plaintiffs, being collected by them from the shippers.

In no essential particular, so far as I can see, does this case differ from that of *Allen v. Sackrider* (*supra*). In that case, as in this, the defendant had upon one previous occasion carried a load for the plaintiffs. In this case, as in that, the defendant had never carried nor offered to carry for any other person than the plaintiffs. The only respects in which a distinction can be drawn between the two cases, are : 1st. That in this case the plaintiffs were common carriers, and the property shipped by them was the property of various persons. Whereas, in the case referred to, the property belonged to the plaintiffs themselves ; and, 2d. That in this case, as the referee finds, the defendant applied to the plaintiffs for a load, and in that case the plaintiffs applied to the defendant to take a load.

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It seems to me that these points of distinction are unessential. It certainly cannot be held, that every person who in an exigency, or upon an occasion, undertakes to transport goods for a common carrier thereby becomes himself a common carrier, and imposes upon himself the extreme measure of liability which attaches to that character. Nor can it be, that a single application for employment to transport goods (for it does not appear that upon the occasion in the previous year, the defendant applied for the employment), amounts to such a holding out to the public in a public employment, as is required by the rule above stated, to constitute the person employed a common carrier. It is, perhaps, worthy of notice, that the referee does not find that the defendant applied to the plaintiffs to obtain him a load, but that he applied to them to furnish him a load. The former language might have implied an employment of the plaintiffs as his agents to contract for him with third persons; the language actually used can be construed only as a proposition to the plaintiffs to carry for them.

And such, I think, all the evidence and the findings of the referee, show the contract to have been. The bills of lading were in the name of the plaintiffs (The Rochester Transportation Co.), as the shippers. They contracted with the owners of the property in their own names; were to collect the freight; effected the insurance in their own names, and upon the happening of the loss, promptly paid the owners of the property, adjusted the loss with the insurance company, and collected the insurance money. It seems to me, from the whole case, that the idea of resorting to the defendant to cover the loss not covered by the insurance, was an afterthought, and a subterfuge.

But, however this may have been, it is clear, I think, that the defendant, whatever his contract with the plaintiffs, was not within the rule well established in this State, a common carrier, and therefore, was only responsible for negligence in the performance of his contract. The referee finds, that the

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loss was not attributable to any degree of negligence or fault on his part.

In my opinion, the judgment should be reversed, and a new trial granted.

All concurring. Judgment reversed, and new trial granted; costs to abide event.

JOHN C. FOSTER, Respondent, v. GEORGE J. MAGEE, and others, executors, &c., of JOHN MAGEE, deceased, Appellant.

(GENERAL TERM, SEVENTH DISTRICT, DECEMBER, 1869.)

One of two owners in common of a chattel, being in sole possession, let it for an agreed price. The hirer was ignorant of the ownership in common, but being afterward notified of it, refused when the hire was due, to pay his bailor more than that portion thereof, which represented the latter's interest; the bailor sued to recover the balance, and the hirer set up an assignment of the same from the other owner in common, and that upon an accounting for profits of the chattel, a balance would be found due to him as such assignee, but failed to establish the latter allegation.—*Held*, that the bailor could recover the balance of the price agreed.

APPEAL from a judgment entered on the report of a referee.

The facts found by the referee were substantially these: On the 9th of November, 1857, the plaintiff owned the half of a horse-power dredging machine, used in excavating earth under water, in common with one Osgood, who owned the remaining half. The plaintiff was in sole possession, and for a year previously had been; and during that time he had individually made large outlays for its repairs and expenses, and there was an unliquidated account between him and Osgood for the receipts, and disbursements and profits and loss of the machine.

On the day above named the plaintiff entered into a written contract with the defendant's testator, John Magee, to hire

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out the dredge to him, at a stipulated price per day, to do certain work at the head of Seneca lake, and it was soon afterward delivered to Magee, and he had the use of it under the contract. While he was using the machine, and about the 15th of February, 1858, Osgood gave Magee notice that one-half the dredge belonged to him, and demanded that one-half the earnings should be paid to him, of which notice and demand Magee immediately notified the plaintiff. Before that time Magee made payments on the contract to the plaintiff, but after the notice he declined to pay him beyond one-half the contract price unless indemnified against the claim of Osgood. On the 16th of June, 1858, Osgood sold and assigned to Magee his half of the dredge, and his share of the rent and earnings thereof from the 9th of November, 1857, to the 1st of June, 1858; and on the 17th of the same month the plaintiff sold to Magee his half of the dredge. On the 13th of July, 1858, the plaintiff and Magee met and agreed upon the amount which the machine had earned while in the possession of Magee under the contract, and Magee paid to the plaintiff a sum, which, with the previous payments, made one-half of such amount, the latter still insisting that he was entitled to receive the whole. The referee reported in the plaintiff's favor for \$496, the balance unpaid, with interest from 13th of July, 1858. Magee died during the pendency of the action, and the present defendants, his executors, were substituted in his place.

The appeal was submitted on printed briefs.

D. Rumsey, for the appellants.

H. V. Howland, for the respondent.

Present—E. D. SMITH, JOHNSON and J. C. SMITH, JJ.

By the Court—JAMES C. SMITH, J. There is nothing in the case to relieve defendants from the full force and effect of the agreement which their testator made with the plaintiff,

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unless it is to be found in the fact, that after such agreement was made and fully executed on the part of the plaintiff, Magee acquired the interest of Osgood in the dredge and its earnings. What right had Osgood in respect to the contract? He was not a party to it, nor mentioned in it. The bare fact that he and the plaintiff owned the dredge, as tenants in common, gave him no right to sue upon the contract, or to collect the earnings of the machine, or any portion of such earnings, to the exclusion of the plaintiff. His right was to require the plaintiff to account to him for his proportion of the earnings. When the contract was made, the plaintiff had possession, in fact, of the machine, and delivered it to Magee in pursuance of the contract. True, his possession was, in law, that of both owners in common, as between themselves; but that circumstance does not affect the legal rights of the parties to the contract, so far as the contract is concerned. The plaintiff's possession of the dredge was not wrongful as to Osgood, nor was his hiring of it to Magee. Osgood could not have maintained an action to recover the possession of the machine, either as against Foster (2 Johns., 468; 9 Wend., 338), or as against Magee, who was Foster's bailee. (13 N. Y., 173.) Magee did not contract with Osgood, nor did he know, at the time, that Osgood had any interest in the machine. In short, there was no privity between Osgood and Magee, and Osgood had no right to call on the latter to pay to him for the use of the machine, unless upon equitable grounds, not appearing in the case, such as the insolvency of Foster, and the consequent danger of loss to Osgood, in case of a balance due him from Foster upon an accounting between them.

By the assignment from Osgood, the defendants' testator only acquired such rights in the machine and its earnings as Osgood then possessed. His liability upon the contract, which, as has been said, was then fully executed on the part of the plaintiff, was not affected in any respect, except that as the assignee of Osgood, he acquired a right to call on the plaintiff to account, and pay over any balance due from him, on account of the earnings of the machine, including its

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earnings under the contract in question, and that right he could set up as an equitable defence to an action on such contract, as was done by the answer in the present suit. The defendants, however, do not appear to have insisted, at the trial, upon their right to have an accounting, but they rested their defence upon grounds entirely independent of the state of the accounts. They did not examine the plaintiff nor any other witness as to the accounts, nor has the referee found anything on that subject, except that the plaintiff had expended a large amount for repairs, and there was an unliquidated amount between him and Osgood. The plaintiff, however, testified in his own behalf, on the subject, and his testimony tended to show that the balance of accounts is in his favor.

It follows from these views, that there is certainly no legal defence, and so far as appears, no defence in equity, to the strict legal obligation created by the contract of the defendants' testator.

The judgment should be affirmed.

Judgment affirmed.

HARVEY WYGANT, Appellant, v. WM. N. SMITH, Respondent.

(GENERAL TERM, SEVENTH DISTRICT, DECEMBER, 1869.)

The exemption of a soldier's pay and bounty from levy or sale under an execution (Laws 1864, chap. 578, page 1332), does not extend to property purchased with or otherwise voluntarily obtained in exchange for the same.

The principle and extent of such exemptions explained, per JOHNSON, J.

THIS was an action to recover the value of property upon which the defendant had levied under an execution, and sold, while sheriff of Stenben county. The plaintiff was nonsuited, and took this appeal upon a case made, and exceptions. The facts are stated in the opinion of the court.

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Rumsey & Robie, for the appellant.

A. P. Ferris, for the respondent.

Present—E. D. SMITH, J. C. SMITH and JOHNSON, JJ.

By the Court—JOHNSON, J. The property which is the subject of this action, was clearly liable to be levied upon and sold by execution, at the instance of the plaintiff's creditors. It was not exempt from levy and sale by any statute, and was, therefore, subject to the claims of creditors, as all a debtor's property is at common law. The ground upon which this action is sought to be maintained is, that it was exempted from such levy and sale under the statute of 1864 (see Laws of 1864, chap. 578, page 1332), exempting the pay and bounty of a soldier in the military service of the United States from seizure by execution or attachment, and from proceedings supplementary to execution. This statute exempts "the pay and bounty" only, and does not extend to wagons and harness, or to other personal property of the person who is, or has been, in the military service. It appears, by the undisputed evidence, that the plaintiff left the military service in July, 1865, and, some time afterward, purchased a quantity of standing pine timber, without the land on which it stood, for which he agreed to pay \$1,000; and that, at the time of such purchase, he paid, out of the moneys received by him for pay and bounty as a soldier, \$523. Afterward, and, as is to be inferred from the evidence, without further payment, the plaintiff sold his interest in this timber for \$700 in cash. With this money so received for the timber, the plaintiff purchased one of the wagons and the harness levied upon and sold by the defendant as sheriff, by virtue of the execution in his hands, duly issued upon a valid judgment against the plaintiff. With a portion of the residue of the \$700, the plaintiff bought other personal property, which he sold and exchanged; and, after several sales and exchanges, he obtained the other wagon which was seized and sold as

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aforesaid, and which is embraced in this action. It has never yet been held that, where a debtor voluntarily sells or exchanges property which the law exempts from levy and sale by execution, and converts it into other property which the law does not exempt, the exemption attaches to the new property so purchased or taken in exchange. On the contrary, the spirit and principle of the decisions are all the other way.

The general rule unquestionably is, that all the goods and chattels of a party against whom an execution has been issued, may be levied upon and sold, unless they are specifically exempted therefrom by statute, or by some rule of the common law. The exemption is a personal privilege, which the party in whose favor it exists may waive, and of which no other person can take advantage. A bailee, or mortgagee of such property, cannot claim the benefit of the exemption. The owner, only, can claim the benefit of the exemption, and he may sell such property, or dispose of it at his pleasure. When it is voluntarily sold and converted into money, or other property, not also exempt, the right is gone. The law designates the particular species of property which it exempts, and does not allow the debtor to choose for himself, in respect to the species, or kind of property to be exempted. To allow this, would be to substitute the choice of the debtor for the provisions of the statute. The only decided case, looking at all in this direction, is that cited by plaintiff's counsel of *Tillotson & Wolcott*, not reported, decided by the General Term in this district, at the term in 1865. In that case, a creditor of the defendant, Wolcott, unlawfully seized and sold a cow belonging to the latter, which was exempt property. For this unlawful sale Wolcott brought his action, and recovered a judgment for the value of the cow against the plaintiff in the execution. Thereupon Tillotson, another creditor of Wolcott, undertook by proceedings, supplementary to execution, to get control of that judgment, and have the avails applied upon his judgment. But this court held, that the judgment being for the value of exempt property,

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sold in violation of the debtor's rights, and against his will, was exempt from the claims of other creditors. I did not concur in that decision, but am bound by it, as long as it remains unreversed, in all cases depending upon the same facts. This is quite a different case. Here the exchange of the exempt money, for property not exempt, was voluntary and not forced. And it was with moneys arising from the voluntary sale of this property, not exempt, that the property in question was in part immediately, and in part remotely, purchased or obtained. Profits were realized by the plaintiff in his first venture with a portion of his exempt pay and bounty, and it is impossible to tell whether the property in question represents the profits of the transaction, or the original capital invested. But however this may be, it is enough for this case, that the plaintiff voluntarily paid away the funds which the statute specifically exempted, from the claims of his creditors, and purchased therewith, and held other property, which no law exempts. The property sold is in part the third, and in part the sixth, or seventh, remove, from the original exempt fund. The nonsuit was therefore right, and a new trial must be denied.

New trial denied.

WILLIAM H. CHENEY, Appellant, v. ELIAS WOLF and others.

(GENERAL TERM, SEVENTH DISTRICT, DECEMBER, 1869.)

The mechanics' lien law of 1844 (chap. 305, p. 451), made no provision for liens in favor of those performing labor, or furnishing materials for sub-contractors.

The act of 1854 (chap. 402, p. 1786, extended in 1858 chap. 204, p. 324, to all the cities and counties of the State, except New York, and Erie counties), provided for such liens, but required the notice of claim to be filed in the office of a town clerk; a requirement which could not be complied with except in the towns.

Where, therefore, materials had been furnished upon property in Rochester for a sub-contractor, and the notice filed and claim docketed in the county

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clerk's office of Monroe county, after the act of 1854, but prior to that of 1869 (chap. 558, p. 1855) it was held that no lien had been obtained. *Quere.*—Whether the laws of 1854 (chap. 402), and 1858 (chap. 204), did not completely repeal the act of 1844.

APPEAL by the plaintiff from a judgment entered upon the report of a referee, dismissing proceedings to foreclose an alleged mechanic's lien. The facts are stated in the opinion of the court.

John McConville, for the appellant, conceding that the law of 1844 was, in the main, repealed, argued that the provision directing the lien to be filed in a county clerk's office, therein contained, was still in force, contending that inasmuch as the law of 1844 related exclusively to cities, and the laws of 1854 and 1858, to towns and cities, the obvious design of the last named acts was to establish a *uniform system* for the creation of mechanics' liens, and to extend the provisions thereof to towns, while it was retained in respect to cities.

F. L. Durant, for the respondents.

Present—E. D. SMITH, J. C. SMITH and JOHNSON, JJ.

By the Court—JOHNSON, J. This action or proceeding was instituted to foreclose a mechanics' lien under the statute. The defendant, James Stewart, contracted with the defendant, Wolf, to erect a building for him, said Wolf, on his premises. Stewart contracted with the defendant, Summerhays, to do the work, and the plaintiff furnished certain castings to the sub-contractor, for such building, amounting to the sum of \$258.67. Within thirty days thereafter, and on the 29th of September, 1868, the plaintiff filed a notice of his claim against Summerhays in the office of the county clerk of Monroe county. The notice claimed a lien on the said building and premises for the amount due. The premises were in the city of Rochester. The defendants, Wolf and Summerhays, who appeared, denied by their answer, and

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also upon the trial before the referee, that any lien had been created by the filing of the notice. The referee so held and dismissed the complaint and proceeding, and ordered a judgment against the plaintiff for costs. The plaintiff insists that his claim became a lien, when so filed, under the provisions of the act of 1844. (Session Laws of 1844, chap. 305.) But it seems to me, there is an insuperable difficulty in the way of the plaintiff's claim under that act. The claim itself does not come within the provisions of that act. The claims which are authorized to be filed and to become liens under that act are claims for labor or materials furnished in building houses or other buildings by a contractor, for the owner, or by a third person for such contractor. It does not embrace claims for labor or materials furnished to a sub-contractor. The act applied to the cities of the State (except to the city of New York) and to certain specified villages only, and the claims under it were to be filed in the office of the clerk of the county in which the city or village where the building was should be located. In 1854 another act was passed embracing thirteen of the counties of this State, but not the county of Monroe, by which any person in such counties who should thereafter perform any labor or furnish any materials upon or for any building in erecting, altering or repairing the same might file his claim and make it a lien on the building and premises. (Sess. Laws of 1854, chap. 402.) In 1858 (Sess. Laws of 1858, chap. 204) this act of 1854 was extended to all the counties of the State, except the city and county of New York and the county of Erie. By this act of 1854, as extended by the act of 1858, claims like the one in question against sub-contractors in the county of Monroe might be filed and become liens; but this act required all claims to be filed in the town clerk's office, in the town where the building was situated, and to be docketed by the town clerk of such town, in order to become liens, and in no other place. If, therefore, the plaintiff was entitled to have his claim made a lien at all, it was by virtue of the provisions of the act of 1854, as extended by the act of 1858, which required the notice to be

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filed and the claim to be docketed in the town clerk's office, and not in the office of the county clerk. The lien could only be created by complying with the statute; and as the statute was not complied with, no lien attached to the premises of the owner of the building, and none was created. It may be true, as the plaintiff's counsel claims, that neither the acts of 1854 or 1858 repealed entirely that of 1844; but, however this may be, it is certain that those acts did not operate to enlarge the provisions of the act of 1844 by adding other claims to its provisions. The plaintiff's claim is not aided, that I perceive, by the fact that there is no town clerk's office in the city of Rochester, where the plaintiff's claim could be filed and docketed according to the act of 1854. The court has no power to amend a statute, nor can it hold that when the legislature has specified a town clerk's office they intended a county clerk's office as well. It was undoubtedly a *casus omissus*, which courts cannot remedy. The legislature has supplied the omission as far as it deemed it advisable at its last session by amending the act of 1854, as extended by the act of 1858. (Sess. Laws of 1869, chap. 558.) By this amended act all such claims are to be filed and docketed in the county clerk's office instead of that of the town clerk; but this last act does not affect this case. It only applies to labor and materials furnished thereafter.

The act of 1854 repealed in express terms "all acts heretofore passed for the better security of mechanics and others erecting buildings and furnishing materials in either of the above counties." The effect of this was clearly, as it seems to me, to repeal every part of the act of 1844 in those counties. By the act of 1858 "all the provisions" of the act of 1854 "are hereby extended and declared to be applicable to all the counties of the State," except, &c. And by section two of this act all acts and parts of acts "inconsistent with this act are hereby repealed."

I do not see, therefore, why the necessary effect of the act of 1858 was not to repeal entirely every part and parcel of the act of 1844; thus leaving mechanics in cities other than New

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York and Buffalo without any means of securing their claims by a lien under the statute. But it is not necessary in the view I have taken of this case to decide this question.

The decision of the referee was right and the judgment must be affirmed.

Judgment affirmed.

RANSOM PHILLIPS v. DAVID DE GROAT.

(GENERAL TERM, SEVENTH DISTRICT, MARCH, 1869.)

Where the complaint averred a wrongful taking and carrying away, and conversion of the plaintiff's timber from certain described premises, and the answer denied the plaintiff's ownership of the *locus in quo*, and evidence had been admitted without objection on the trial, to prove injury to growing timber.—*Held*, that a cause of action for trespass to land was sufficiently pleaded.

By the terms of a contract for sale of timbered land, the vendee agreed that half of all the timber prepared for market, should be applied upon the purchase, and that he would not remove any timber without the vendor's consent, until the purchase money should be paid; he was to pay the taxes, and have a deed on full compliance with the terms of the contract; and on his failure to perform, it was provided that the vendor should have the right to take possession.—*Held*, that the vendee had a right of immediate entry, and though not in actual occupancy at the time, such constructive possession under the contract, as enabled him to maintain trespass against one who wrongfully cut timber on the premises.

Held further, the vendee having contracted for sale of the land, with reservation of the timber, and for its possession, "except so far as relates to the timber," that he could maintain trespass against one who entered under an assignee of his contract of sale, and cut down trees.

And that an action against such assignee, for the conversion of timber previously cut upon the premises, would lie by the said vendee by reason of his special property therein, and that if the effect of the agreement with his vendor, was to pledge the timber as security, he was entitled to show a waiver, or fulfillment of the conditions of the pledge

MOTION by plaintiff for new trial on exceptions. The facts are stated in the opinion.

Present—E. D. SMITH, JOHNSON and J. C. SMITH, JJ.

Phillips v. De Groat.

By the Court—JAMES C. SMITH, J. The complaint alleges, in substance, that in the years 1866, 1867 and 1868, the plaintiff was the owner of certain timber, being on a piece of land in Lindley, Steuben county, therein described; and that during the time aforesaid, the defendant wrongfully took, carried away, and converted the said timber to his own use. The answer denies the complaint, and alleges property in third persons, and also in the defendant.

On the trial, at the Steuben circuit, in October, 1868, the plaintiff was nonsuited, and the question is, whether he had such possession or title, as was necessary to maintain the action.

It appeared at the trial, that on the 10th March, 1864, Gabriel F. Harrower contracted in writing to sell the plaintiff the premises described in the complaint, for the sum of \$1,000, to be paid therefor by the plaintiff to Harrower; \$100 down, and the remainder in six years by installments, with interest. By the terms of the contract, Harrower reserved the right, "to go upon and occupy said premises for the purpose of fulfilling a certain contract made with Hayt & Towner, and Simeon Hammond. It was also agreed by the plaintiff, that one-half of all timber cut, hewed, or in any manner prepared for market, should be applied upon the purchase, and that he would not remove any lumber or timber from said lot without Harrower's consent, until payment of all the purchase money. The contract contained a provision, that Phillips was to pay all taxes on said land, and in case he should fail to comply with the terms of the contract, that Harrower should have the right to take possession of the premises. On full compliance with the terms of the contract by Phillips, Harrower was to give him a deed.

The plaintiff paid to Harrower, on the contract, \$100, March 10, 1864, and \$476 by the sale of oak logs, March 10, 1865.

On the 15th April, 1865, the plaintiff contracted to sell the premises to Archibald Manley, for \$500, by an instrument in writing, which referred to the contract with Harrower, dated

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the 10th March, 1864, and contained a reserving clause in these words: "Excepting and reserving from such sale, all the ties and timber then (the date of the contract with Harrower) standing and being on said lot, suitable for railroad ties or for sawing purposes, with the right to enter upon said land at any time within six years from the 10th March, 1864, to cut and move said timber." Manley agreed to pay fifty dollars down, and seventy-five dollars, with interest, to be computed from 10th March, 1864, and payable on the 10th March in each year, all to be paid to Harrower, to be applied in payment of his contract; and, when the \$500 was fully paid, Harrower was directed to deed to Manley. The contract provided that Manley was "to have possession of the premises immediately, except so far as relates to said timber named, but in the occupation thereof he shall not injure or destroy said timber."

While the plaintiff held the contract, the land was wild and uncultivated; but the plaintiff got timber from it, and, by his permission, a man named Hamlin, who was employed in hewing ties for the plaintiff, during the winter of 1865, occupied a house on the lot while he was so employed. There was no other actual occupation of the lot by any one before the plaintiff sold to Manley. In the fall of 1865, Manley assigned his contract to Wilson, who went into possession of the land under the contract, and lived there till the spring of 1867, when he assigned the contract to Mrs. De Groat, the wife of the defendant, and the defendant then went into possession. The evidence tended to show that while defendant was in possession, he cut down some of the timber reserved by the plaintiff, and converted it to his own use; and also used and converted other reserved timber that had been previously cut down by Wilson, and was lying on the premises.

The plaintiff offered to prove that Harrower had notice of the contract with Manley, and agreed to take it as security, and permit the plaintiff to take off the timber as he pleased, without asking Harrower's consent; also that Harrower had more than half the timber that was on the land when the

contract was made to Manley. Each offer was excluded, and plaintiff excepted.

It is suggested by the defendant's counsel, that the cause of action alleged in the complaint is what would have been called trover under the old system, and not trespass. I think, however, that although the complaint is perhaps somewhat inartificial, the cause of action which it sets out, is to be regarded by fair construction, as in trespass for entering upon the plaintiff's close, and wrongfully taking and conveying timber therefrom, the property of the plaintiff, and converting the same to the defendant's use. The complaint not only avers the wrongful taking and conversion of timber, which would be enough in trover, but it also describes the premises on which it was situate.

The pleader who drew the answer, evidently so understood the complaint, as he avers, by way of defence, that the timber was growing on the land of Harrower, to which the plaintiff had no title. And at the trial, the plaintiff was permitted, without objection, to give evidence tending to show, not only that the defendant had taken and used cut or fallen timber, but also, that he had cut down and removed *standing* trees, which the plaintiff claimed to have reserved.

We are, therefore, to inquire whether the plaintiff had any such title, or possession, as would enable him to maintain an action, either of trespass to real property, for the trees which the defendant severed from the soil, or of trespass to personal property, for those which having been previously severed by a third person, were wrongfully taken and appropriated by the defendant.

1st. As to trespass to the realty. The general rule is, that to maintain trespass *quare clausum*, there must have been an actual possession in the plaintiff when the trespass was committed, or a constructive possession, in respect to the right being actually vested in him. The ground of the action, is the injury to the possession (4 Kent, 120.) A general property, in the case of real estate, is not, as in the case of personal, sufficient to support trespass. Thus, it has

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been held, that a lessor can not maintain trespass against a stranger, while there is a tenant in possession (*Campbell v. Arnold* 1 Johns., 511), though this rule has been held not to apply, if the tenant in possession was one at will merely (*Starr v. Jackson* 11 Mass., 519); but otherwise, provided the tenant was one holding from year to year. (*Catlin v. Hayden*, 1 Verm., 375.)

An actual *pedis possessio* is not necessary, in all cases. Thus, a constant and uninterrupted use of an unfenced lot, for twenty years, as a wood lot for the farm on which the plaintiff lived, has been held a sufficient actual possession to maintain the action. (*Machin v. Geortner*, 14 Wend., 239.)

If the premises are vacant, the right of action is in the party having the legal title. By this is meant such title as draws to it possession. Where the right of property and the right of possession, which are separate and necessary ingredients of a perfect title, are vested in different persons, the party having the right of possession may maintain trespass; and where a man has a separate interest in the soil for a particular use, although the right of the soil is not in him, if he be injured in the enjoyment of his particular use of the soil, he may maintain trespass *quare clausum*. In *Wilson v. Mackreth* (3 Burr, 1824) the plaintiff had an exclusive right to take the turf in a several parcel of ground, in which and in other parcels adjoining he and the other tenants of the manor had common of pasture, the right of the soil being in the lord of the manor. The defendant dug and carried away plots in the place in question, and it was held that the plaintiff might maintain trespass *quare clausum* against him. In *Clap v. Draper* (4 Mass., 266) it was held that a grant to one, his heirs and assigns, of all the trees and timber standing and growing in a close forever, with free liberty to cut and carry them away at pleasure, conveys an estate of inheritance in the trees and timber, and the grantee may maintain trespass *quare clausum* against the owner of the soil for cutting down the trees.

The contract from Harrower to the plaintiff, vested in the latter, an equitable title to the fee of the land, with a lawful

right to enter immediately into the possession of the premises and to cut the timber and prepare it for market, for the purpose of supplying himself with means to pay for the land. So long as he complied with the terms of the contract Harrower could not lawfully disturb his possession. Under the contract the plaintiff went into possession in fact, cut timber, marketed it, and paid the proceeds, or some part of them, to Harrower on the contract. While he was thus in the actual possession he could undoubtedly have maintained trespass against a naked wrong doer, and it seems equally clear that while the premises were vacant, after his purchase from Harrower, and before he sold to Manley his exclusive legal right to the possession, drew to it the constructive possession and the right to maintain trespass.

The effect of the reservation of the trees and timber in his sale to Manley was to continue in him the same rights as were theretofore possessed by him in respect to the trees and timber thus reserved and the soil on which they stood. The reserved trees and the soil on which they were growing, thereby became a separate close, of which he retained the exclusive legal right of possession so long as he performed his contract with Harrower.

If, in a lease for years, there be a reservation of the trees, the lessor may maintain trespass against any person who cuts them down or injures them, for by the reservation of the trees the land in which they grew was reserved also, and the lessor in possession of it in fact at the time of the trespass (8 East., 190; 1 Arch. N. P., 411). (See also 6 East. 602; Selw. N. P., 1287; *Clap v. Draper, sup.*) The possession of the lot which Manley derived from the plaintiff was co-extensive with his purchase only, and did not extend to the trees, which the plaintiff reserved to himself.

If the foregoing considerations are correct, it follows that the plaintiff, having an interest in the reserved trees, coupled with an exclusive right of possession, could maintain trespass against the defendant, in respect to those which he wrongfully removed from the soil

As to the reserved timber previously cut down by Wilson, and carried away by the defendant, the plaintiff, for the purposes of this action, may be regarded as having a special property therein, with the immediate right of possession. We have seen that under the contract with Harrower, the plaintiff had a right to cut down the timber, and fit it for market. He had an interest in doing so, as a means of paying for the land. By the terms of the contract, he could not, however, remove the timber from the lot without Harrower's consent, and Harrower could insist that the avails of at least one half of it should be applied upon the contract. Whether the effect of these latter provisions was to retain in Harrower the general title to the timber until it was marketed, or whether they merely created a security in his favor for the payment of the purchase money, is immaterial for the purposes of this action. If the general property was in Harrower, the plaintiff had an interest in the timber, coupled with the right to reduce it to his possession when he pleased, and he could therefore maintain trespass against a wrong doer. If the conditions referred to were in the nature of a security to Harrower, he could release or waive them, and the plaintiff offered to show that he had done so. In either view the plaintiff's right to maintain trespass, *de bonis asportatis*, is perfect.

In the view I have taken of the case, the question whether the defendant, as the vendee of the plaintiff, is estopped from disputing the title of the latter, does not arise. I infer, however, from the course of the argument submitted to us, that the counsel on both sides presented that question at the circuit as a vital point in the case. If it were necessary to pass upon it, I should concur in the disposition made of it at the circuit, for the reason that as the trees did not pass by the contract, under which the defendant claims title, no estoppel can arise as to them.

But upon the ground above stated, I think the nonsuit should be set aside, and a new trial ordered, with costs to abide event.

Ordered accordingly.

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NOAH ROOT, Respondent, v. THE GREAT WESTERN RAILWAY COMPANY.

(GENERAL TERM, SEVENTH DISTRICT, MARCH, 1869.)

The New York Central Railroad Company received goods from the plaintiff, directed to a certain place on the Michigan Southern railroad, and, under a special agreement limiting its liability to its own route, carried them to Suspension Bridge, upon such route, and there delivered them to the defendant. The defendant's road, extending from Suspension Bridge, N. Y., to Windsor, Canada, connected with that of the Michigan Southern Railroad Company, by ferry from Windsor, at Detroit, where under a contract between the two companies, for the purpose, the defendant was accustomed to deliver freight arriving by its line, to the Michigan Southern Company, for transportation to points on the road of the latter, which collected the entire freight charges on the final delivery, and periodically accounted for the portion thereof, due to the defendant. The defendant received the goods in question for transportation without limiting its general duties as a common carrier.—*Held*, that it impliedly undertook for the carriage thereof to their place of destination, and was liable therefor as a common carrier after it had delivered them to the Michigan Southern Company, at Detroit.

The case distinguished from *Van Santvoord v. St. John* (6 Hill, 157), by reason of the contract between the carriers and their custom under it.

If doubt existed as to such liability of the defendant at common law, its liability under the statute of 1847 (chap. 270, § 9) was undeniable.

The defendant having made the contract for transportation at the terminus of its route within the State, it was liable under the provisions of the act although a foreign corporation.

And this was so, although the Michigan Southern Company was a foreign corporation also, and not liable over to the defendant, under the act.

It seems, that the statute in question is not limited to domestic corporations only.

Nor was the defendant's liability, under it for the plaintiff's goods while in charge of the Michigan Southern Company, limited to the case of loss by reason of the latter's "neglect or misconduct."

Nor is the statute in question simply declaratory of the common law; it created a new rule of liability in respect to connecting railroad corporations.

Nor was it material upon the question of the liability that the New York Central Company, and not the defendant, originally received the goods.

By the act in question, each successive railroad company forming a link in the chain of communication between the place of freighting and the

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place of destination, which agrees to convey property beyond the terminus of its own road, and receives the goods under such an agreement, is liable, as a common carrier, for the delinquencies of each of the other roads, running in connection with it, over which the property shall subsequently pass, on the route to the place of delivery. *Smith v. N. Y. C. R. R. Co.* (43 Barb., 225), upon the latter point, explained.

THIS was an appeal from a judgment upon the report of a referee in favor of the plaintiff.

The action was brought to recover the value of a chest of joiner's tools and clothing which the plaintiff had delivered to the New York Central Railroad Company at Victor, Ontario, N. Y., a place on its road, directed to himself at Burr Oak, Branch county, Michigan, a place on the Michigan Southern and Northern Indiana railroad, and for which he had taken a receipt from the New York Central Railroad Company, which provided that the goods were "to be transported by the New York Central Railroad Company, to their warehouse at Suspension Bridge, ready to be delivered to the party entitled to the same," and "that the company is not to be held liable for the loss of said property, or for any damage or injury to the same, or for any delay in the delivery thereof by any other carrier, cartman or freightman after the same has been loaded, shipped or sent from the company's warehouse at Suspension Bridge aforesaid."

The New York Central Railroad Company carried the goods to Suspension Bridge, N. Y., where its road connected with that of the defendant, and delivered them there in due season from its warehouse to the latter. The defendant's road extended from Suspension Bridge to Windsor in Canada, and from Windsor it connected by water, across the Detroit river, with the road of the Michigan Southern and Northern Indiana Railroad Company; the defendant received the goods unconditionally, and without special contract limiting its general liability or duties as a common carrier, and in due season delivered them to the Michigan Southern and Northern Indiana Railroad Company, at its warehouse in Detroit.

There was an agreement between the defendant and the

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Michigan Southern and Northern Indiana Company, by which freight arriving by the defendant's road at Detroit, was received and carried to points on the Michigan Southern road, and the freight money collected on delivery at its destination, for the entire distance on both roads, by the Michigan Southern Company, which paid over to the defendant from time to time the portion to which it was entitled.

While the property was in the custody of the Michigan Southern and Northern Indiana Company, and in its warehouse at Detroit, it was consumed by a fire, together with the warehouse and its other contents, which, as the referee found, had occurred without negligence or fault of either company.

The referee reported in favor of the plaintiff; judgment was entered on his report, and the defendant appealed.

E. C. Sprague, for the appellant.

Quincy Van Voorhis, for the respondent.

Present—E. D. SMITH, JOHNSON and J. C. SMITH, JJ.

By the Court—JAMES C. SMITH, J. The plaintiff's property, which the defendants received for transportation, was directed to "Burr Oak, Michigan," a place on the line of the road of the Michigan Southern railroad. The road of the Michigan Company and that of the defendants were connected together at Detroit, and the Michigan Company was under an agreement with the defendants to carry freight arriving at Detroit by the defendants' road to places along its line. For this purpose the defendants, pursuant to the agreement, were accustomed to deliver their freight at the warehouse of the Michigan Company at Detroit, and the latter received it there and transported it to its destination, collecting the entire charges for freight on both roads at the place of destination, and at stated periods the Michigan Company settled with the defendants and paid them their share of the freight

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thus collected. The defendants having received the plaintiff's property for transportation under these circumstances without any express contract or limitation of their liability, and in the ordinary course of their business as common carriers, impliedly contracted for its carriage to its place of destination. The agreement between the two companies, and their custom, in pursuance of the agreement, distinguishes the case from that of *Van Santvoord v. St. John* (6 Hill, 157) and others cited by the appellant's counsel. The agreement between the two companies created reciprocal obligations as between themselves, the defendants being bound to deliver to the Michigan Company for transportation all property coming over their road destined to points on the line of the Michigan Company, and the latter being bound to receive such property and carry it to its destination, and also to collect the freight earned by the defendants in respect to it, and to account to them therefor. Had such a connection existed between the river boats and the canal line in *Van Santvoord v. St. John*, it is obvious from the course of reasoning adopted in the published opinions that the decision of that case would have been the reverse of what it was.

But if there is any doubt concerning the defendants' liability, independently of statute, the existence of such liability under the provisions of the act of 1847 (ch. 270) seems to me undeniable. The act referred to provides that whenever two or more railroads are connected together, any company owning either of said roads receiving freight to be transported to any place on the line of either of said roads so connected shall be liable as common carriers for the delivery of such freight at such place. The act further provides that in case any such company shall become liable to pay any sum by reason of the neglect or misconduct of any other company or companies, the company paying such sum may collect the same of the company or companies by reason of whose neglect or misconduct it became so liable (§ 9).

The defendants' counsel argues that the statute does not apply to the defendants for the reason that they are a foreign

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corporation, and the statute is evidently framed, it is said, with respect to domestic corporations, and those only. Although the defendants are a foreign corporation, one terminus of their road is in this State, and at that point they received the plaintiff's property and made the contract respecting it, out of which, if at all, the liability arises, which the plaintiff seeks to enforce in this action. In respect to contracts made by the corporation within this State, the corporation is amenable to the laws of the State, and the act in question is applicable to such contracts.

The act also applies, notwithstanding the company owning the connecting road (the Michigan Company) is also a foreign corporation, and its road is wholly without this State. This was held in *Burtis v. The Buffalo and State Line Railroad Company* (24 N. Y., 269). If, as is argued by their counsel, the defendants cannot avail themselves of the remedy over against the connecting road, given by the act, by reason of the fact that the defendants and the Michigan company are foreign corporations, they might have protected themselves against liability for a loss occurring through the fault of the connecting road by an express contract to that effect, as suggested by Mr. Justice DENIO in the case last cited.

It is also argued that the statute does not apply to the case, for the reason that the loss was not owing to any neglect or misconduct on the part of the connecting company. But that circumstance does not relieve the company receiving the freight from liability to the owner.

The company receiving the freight for transportation to a point on the line of a connecting road, without any express limitation of its liability, by that very act becomes liable as a common carrier for the delivery of the freight at such point. It insures the property, on its transit, against *all* loss, except that arising from the act of God or the public enemy. Where the loss is caused by the neglect or misconduct of the connecting road, the insurer has a remedy over, by way of indemnity. In all other cases he must make good the loss, without recourse to any other party.

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It is further argued, that the section referred to is simply declaratory of the common law, and that the question, therefore, is whether by the common law, carriers are responsible for the delivery of property directed to points beyond their own routes. But the statute creates a new rule. It makes the company receiving the property liable, as a carrier, in respect to the connecting road, as well as its own, unless it expressly provides otherwise by its contract.

Lastly, it is insisted by the counsel for the defendants, that the statute goes no further than to impose the liability in question upon the company originally receiving the property for transportation, to wit., in the present case, the New York Central Railroad Company.

If this position were correct, I should be inclined to agree to the conclusion which the counsel deduces from it, that the plaintiff, by making a contract with that company, expressly relieving it from such responsibility, waived his rights under the statute, or, at least, that the defendants, having no notice of such contract, did not assume any other obligations than those which they would have incurred if such contract had not been made.

But I apprehend the true construction of the act, in this respect, is that each intermediate carrier, as well as the first, who receives property to be transported to a point on the line of a connecting road, without an express limitation of his liability, is responsible for its transportation over his own road, and also over every other connecting road, on which it must subsequently be carried to reach its place of destination. It is not material to his liability whether the previous carrier has been relieved from the responsibility imposed by the statute or not. The intermediate carrier is not liable, however, for loss or injury happening to the property while in the hands of a previous carrier; and this point is all that was decided in the case of *Smith v. The New York Central Railroad Company*, cited by the defendants' counsel (43 Barb., 225). Although the question now under consideration was suggested by my learned brother, who wrote the

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opinion in that case, his remarks upon it were merely by way of illustrating and enforcing his views of the real point in controversy. The question was not presented by the facts of the case, and consequently it was not before the court and was not decided.

There is no reported case, that I am aware of, in which the question has been adjudicated. As was said by Judge DENIO in *Burtis v. The Buffalo and State Line R. R. Co. (sup.)*: "The act is eminently a remedial law, and should receive a liberal, as distinguished from a narrow, construction." The language of the clause on which this question depends is very broad. It applies to every case of railroads connected together, however many. It makes liable *any* company owning *either* of railroads, receiving freight to be transported to any place on the line of either of said roads so connected, without limiting the liability to the company *first* receiving it. In short, as I read the act, each successive railroad company forming a link in the chain of communication between the place of freighting and the place of destination, which agrees to carry property beyond the terminus of its own road, and receives the goods under such an agreement, shall be liable as a common carrier for the delinquencies of each of the other roads running in connection with it, over which the property shall subsequently pass, on the route to the place of delivery.

The foregoing views of the case make it unnecessary to examine any other question presented by the points of counsel. I am in favor of affirming the judgment.

Judgment affirmed.

Carpenter v. Blake.

LEVANTIA S. CARPENTER, Respondent, v. ZERA H. BLAKE,
Appellant.

(GENERAL TERM, SEVENTH DISTRICT, MARCH, 1869.)

A medical expert, called as a witness, is not qualified to express an opinion based on previous testimony in the case, where he has not heard all the testimony which may have been material to the subject of inquiry.

In an action against a surgeon for the negligent and unskillful treatment of a dislocated arm, the defendant claimed "consecutive luxation" or displacement after an actual reduction.—*Held*, that it was not competent to ask a surgical witness, who had heard the testimony of surgeons and others having knowledge of the injury and condition of the arm, whether, from the facts sworn to he believed there had been been "consecutive luxation."

And, per DWIGHT, J., a question of this character, to be admissible, must be an hypothetical one, based either upon the hypothesis of the truth of all the evidence given in the case, or upon an hypothesis, specially framed, of certain facts assumed to be proved for the purpose of the inquiry.

THIS action was brought to recover damages from the defendant for negligent and unskillful treatment of the plaintiff, by whom he had been employed as a surgeon and physician.

The action was tried before a court and jury, when it appeared that the defendant, who was a regularly practicing surgeon and physician, had been called in by the plaintiff, after a fall from a horse whereby her arm had been dislocated at the elbow, and that thereupon the defendant had made an effort, in the usual method, to reduce the dislocation, and afterward remained in charge of the case. The plaintiff's arm was shown to be stiff and deformed, and incapable of ordinary use; and this she claimed to be the result of the defendant's failure to reduce the dislocation, and of other unskillful treatment by him subsequently.

The defendant claimed, as part of his defence, and gave evidence in that respect under a general denial, that the dislocation had been originally reduced by him, but that the arm had been the subject of consecutive luxation, and the parts again displaced.

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After testimony had been taken from surgeons who had had the arm under examination, and other surgeons who had had opportunity to know of the character of the injury, and from the plaintiff and others respecting the operation performed by the defendant, and the circumstances connected with the injury, one of the plaintiff's witnesses, who was duly qualified as an expert, who testified that he had heard the evidence given by the surgeons, but that he was absent for about twenty minutes while the plaintiff was testifying, was asked, by the plaintiff's counsel, the following question: "Do you believe, from what you have heard of the testimony in this case, that this arm has been the subject of consecutive luxation?" The defendant's counsel objected that the witness had not heard all the testimony; and also for the reason "that it was improper to ask the witness a question founded upon the testimony in the case, and that the plaintiff's counsel should put a hypothetical question and ask the witness his opinion upon that."

The court overruled the objection, and the witness answered: "I do not believe it has been," and the defendant excepted.

The jury found a verdict for the plaintiff, and the defendant took this appeal.

Scott Lord, for the appellant.

S. D. Faulkner, and with him *James Wood*, for the respondent.

Present—E. D. SMITH, JOHNSON and DWIGHT, JJ.

DWIGHT, J. I think the court erred in overruling the defendant's objection to the question put to the witness, Dr. Campbell, "Do you believe from what you have heard of the testimony in this case that this arm has been the subject of consecutive luxation?"

In the first place it appeared that the witness had not heard

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all the evidence in the case, having been absent for twenty minutes while the plaintiff herself was testifying, and during which time evidence very material upon the point in issue may have been given.

But the question was obnoxious to a more general and serious objection. It called upon the witness for a conclusion from all the evidence he had heard in the case without assuming any facts as established thereby. The witness was therefore permitted to accept such of the evidence as he believed to be true and reject such as he did not deem reliable. This was to permit to him the province and prerogative of the jury.

In this case it was a theory of the defence that the dislocation of the plaintiff's elbow had been once reduced, but that subsequent to the discontinuance of the defendant's visits the parts had been again displaced by "consecutive luxation." Whether such was the case or not, was precisely the question for the jury. To aid them in deciding that question it was competent and proper to adduce the opinion of a witness skilled in the science of anatomy and the art of surgery. But such an opinion can be formed by one who has had no knowledge of the case itself only upon an assumption of certain facts as established on the trial; and the question in the present instance left it to the witness to say what facts were established by the evidence which he had heard. This, it is clear, was the province of the jury.

As I understand the rule, a question of this character, to be admissible, must always be an hypothetical one, based either upon the hypothesis of the truth of all the evidence given in the case, or upon an hypothesis, specially framed, of certain facts assumed to be proved for the purpose of the inquiry. Such a question leaves it for the jury to decide in the first case whether the evidence in whole or in part is true or not, and in the second case whether the particular facts assumed are or are not proved.

Such a question calls for a purely scientific opinion, which may be properly considered by the jury, provided they find the facts to be established as assumed.

Warren v. Winne.

The vice of the question objected to is, that it left nothing for the jury to decide.

Such I understand to be the effect of the authorities upon this question, and if I am right the judgment must be reversed and a new trial granted.

Judgment reversed and new trial granted, costs to abide event.

EDWARD K. WARREN, Respondent, v. CHRISTOPHER WINNE,
Appellant.

(GENERAL TERM, SEVENTH DISTRICT, MARCH, 1870.)

An agreement to sell certain growing hops at so much per pound, and that they should be of first quality, held to intend harvesting and preparing the same for delivery as hops are usually prepared for marketing by weight.

APPEAL from a judgment for the plaintiff, entered upon the report of a referee, for the value of hops raised upon the defendant's farm, and for which the plaintiff claimed under an agreement to sell to his assignor. The facts are sufficiently stated in the opinion of the court. The case was submitted upon briefs, without oral argument.

Benedict & Martindale, for the appellant.

George W. Miller, for the respondent.

Present—JOHNSON, J. C. SMITH and DWIGHT, JJ.

By the Court—JOHNSON, P. J. The point made upon the trial, on behalf of the defendant, that the contract if made, as alleged, between the parties, was void by the statute of frauds, for the reason that it related to an interest in real property, is not now made, and is presumed to be abandoned.

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It is now urged by the defendant's counsel, as it was before the referee, that the agreement if made in the terms shown by the evidence, was void for uncertainty. The agreement was verbal, and was made, as the referee finds, on the 25th of May, 1864, and related to the hops then growing on the defendant's farm. It was in substance as follows: The plaintiff's assignor asked the defendant if he would take fifteen cents per pound for his hops of the present season, to which the defendant answered he would. The plaintiff's assignees then said the hops must be of the first quality, and the defendant replied, yes. The former then took from his pocket book five dollars, and gave it to the defendant, saying that he gave it to bind the bargain. The defendant took the money, and has since kept it, without any offer to return it. I do not perceive any uncertainty about this bargain. It contains all the elements necessary to a valid agreement. Here are the mutual assent of two persons, competent to contract; a good and valid consideration; and a thing to be done by each of the parties. The subject of the contract, the thing to be done in reference to it, by each party, and the price, and all either distinctly expressed, or clearly implied in the terms used. It is claimed, that it does not appear from the terms, or scope of the contract, what the defendant was to do to be entitled to the price. But this is all implied in the agreement to sell at fifteen cents per pound, and that the hops should be of first quality. It was clearly a part of this undertaking, on the part of the defendant, to prepare his crop and put it in the same condition for delivery that such a crop is usually put in, when marketed by weight, as much so as though it had been expressed with the utmost detail and precision. The law will interpret it an agreement, to do whatever is usually done in the regular course of trade and dealing in that article, as there is nothing in the terms to take it out of the ordinary course. The presumption in such a case must be, that the parties mutually intended performance in the usual and customary manner. If the arrangement was sufficient, in point of terms and form, to amount to an agree-

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ment, there can be no doubt that the payment and acceptance of the five dollars, rendered it valid and binding as to both parties.

The findings of fact, by the referee, are fully warranted by the evidence. He finds that the plaintiff showed the defendant his assignment, and demanded the delivery of the hops either at the premises of the defendant, or at some other point on the railroad as might be most convenient; and that the defendant refused to deliver the hops, or any part of them. There is no evidence that Van Valkenburg, before he assigned the contract, abandoned or rescinded it, or assented to its non-performance by the defendant.

The judgment must therefore be affirmed.

Judgment affirmed.

FRANCIS CHANNON, Respondent, v. DENNIS LUSK, Appellant.

(GENERAL TERM, SEVENTH DISTRICT, MARCH, 1870.)

Owners in common of grain or other personal property, in its nature separable in respect to quantity and quality by weight or measure, may sever their portions of the common bulk at will, and where one of such owners is in possession of the whole, his refusal to permit the separation by another owner, of the latter's share, is equivalent to conversion, and trover will lie in consequence.

On a trial upon appeal in the County Court, the jury gave a verdict for the plaintiff for \$284.37, upon which he entered judgment with costs, in the aggregate for \$519.72. The complaint below demanded \$200, and it did not appear whether it had been amended, and no question was raised upon rendition of the verdict or otherwise in respect to the amount thereof. On appeal to this court the judgment was sustained.

THIS was an appeal by the defendant from a judgment of a County Court upon the verdict of a jury after trial on appeal from the court of a justice of the peace.

The complaint set forth an action in the nature of trover for certain crops and other farm produce, and demanded judgment for \$200. The answer was a general denial. The

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plaintiff had a verdict before the justice for the amount demanded in the complaint.

It appeared that the plaintiff had let his farm to the defendant to work upon shares, and that the plaintiff was entitled to one-third of the crops and of other produce; the grain to be divided in the half bushel, in the proportion of two-thirds to the plaintiff, and one-third to the defendant; after harvesting and threshing the oats raised during the contract, and before they were cleaned, the plaintiff left them in the defendant's possession in the latter's barn, upon the farm, and afterward when he demanded the right to clean and separate his share thereof, the defendant refused permission and ordered him from the premises, whereupon the plaintiff brought this suit. The jury rendered a verdict without objection by the defendant, when it was rendered, in favor of the plaintiff, for \$284.37, upon which judgment was entered for that amount and for costs, \$235.35, in all \$519.72. It did not appear whether the complaint had been amended to correspond with the amount of the verdict. The defendant took various exceptions to the charge of the county judge, which sufficiently appear in the opinion of the court.

Ripsom & Terry, for the appellant.

George F. Danforth, for the respondent.

Present—JOHNSON, J. C. SMITH and DWIGHT, JJ.

By the Court—JOHNSON, P. J. Unless we can hold that the act of the defendant in refusing to allow the plaintiff to clean up the oats, so that they might be divided in the half bushel, according to the contract, and to divide them and take away his share, is a conversion of the plaintiff's sole property, this action cannot be maintained. Unless that was a conversion, there was nothing which amounted to a conversion by the defendant, until some time after the action was commenced before the justice, which was the 27th of

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April, 1863. The plaintiff's agreement for the occupation of the premises expired on the 15th of April, 1863. He left the premises, as he testifies, three or four days after that. He then came back, as he says, three or four times before the action was commenced, for the purpose of cleaning up the oats and dividing them, and taking his share away. He testifies, that the defendant on these occasions refused to allow him to clean up the oats; refused to allow him to divide them and take his share away, and ordered him off the premises. He then commenced this action for the conversion of his share of the oats.

This court held in *Tripp v. Riley* (15 Barb., 335), that where tenants in common held property, severable in its nature, like grain, where the share of each could be determined by measurement or weight, each tenant had the right to sever it, and take his share and sell it, or otherwise appropriate it without being liable to his co-tenants for a conversion of the common property. The same rule was laid down in *Fobes v. Shattuck* (22 id., 568). This is in accordance with the rule of the civil law (1 Domat, Cush. ed., § 1498), as to things held in common which are divisible in equal proportions.

The rule should, of course, be confined to property readily divisible and commonly divided by weight, tale, or measure, into portions absolutely alike in quality and value, as grain in bulk, money, and the like. It could not reasonably be applied in principle, or in practice, to things in their nature so far undivisible that the share of one cannot be distinguished from that of another, and where each article or item has a distinct identity, plainly distinguishable from the others, and a different value. The doctrine that one tenant in common cannot maintain trover against his co-tenant as long as the latter keeps possession of the common property, and until a loss, sale, or destruction of it can be shown, was applied originally to property of this latter description.

Thus in Coke on Litt, 199 b, it is laid down: "But if two be possessed of chattels personals in common by divers titles,

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as of a horse, an ox, a cow, &c., if the one take the whole to himself out of the possession of the other, the other hath no remedy but to take this from him who hath done the wrong, to occupy in common, &c., when he can see his time, &c." He might "take to occupying in common when he could see his time." It will be found, I apprehend, on examination, that most, if not all the modern cases in which this general rule has been laid down, relate to property of this latter description, which is in its nature adapted to common use, and is not divisible or severable readily without a change of its condition. But this rule has no reasonable or proper application to articles like grains or fluids in bulk or money not adapted to common use amongst several owners. Such property is most commonly used in several portions, according to the respective rights of the common owners, for sale, consumption or other use, by each, and indeed it scarcely admits of any other.

The case of *Fiquet v. Allison* (12 Mich. R., 328) was in its facts precisely like the case at bar, and the court, in a careful and well reasoned opinion, held that the plaintiff might recover. The court in that case say "it can hardly be questioned that the refusal of any one to give up to another that to which such other has a better right, would be a conversion." It must be admitted, as the decisions in this State now stand, that the plaintiff had the absolute and unconditional right, when the oats in question were cleared up and in readiness for partition and market, to go and take his one-third of the whole quantity and use it or sell it without any infringement of the rights of the defendant. It was his right to sever and take his share of the common bulk. This right he was prohibited from exercising by the defendant. He was not allowed to put the oats in the condition, in which he was, by the agreement, to put them, before delivering to the defendant his two-thirds. Nor was he allowed to take his share, which was all he sought to take. He did not seek or wish to take the common property, but only to sever it and take his own. The refusal of the defendant was not to deliver to the

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plaintiff the common property. If it had been, the action could not have been maintained; but he denied the plaintiff and refused to permit him to exercise the right of severance and to take what would, had that right been exercised, become the plaintiff's own exclusive property. It is not very material whether this is called a conversion of the plaintiff's property or, an unlawful interference with his legal rights. In either case the plaintiff is deprived of his property, and the privilege of using it or selling it, as he might see fit. He is damaged to the extent of the value of his property.

This rule thus limited, seems to us to commend itself to general acceptance, by its obvious good sense, its feasibility, and its easy adaptation to all the rights, interests, and conveniences of common owners of the kind of property in question.

In *Farr v. Smith* (9 Wend., 338), which was an action of trover for grain in the sheaf, the question presented in this case did not arise. All that was held in that case, and all which the facts called for, was, that no action would lie, merely for the dispossession by one tenant in common of the other tenant, of the common property. The denial of the right of severance was not in that case.

In addition to the cases before cited, decided by this court, touching the right of one tenant in common to sever and take his own share by his own act, may be cited the case of *Kimberly v. Patchin* (19 N. Y., 330). Judge Comstock, at page 210 of that case, says: "I think each party would have the right of severing the tenancy by his own act; that is, the right of taking the portion of the mass which belonged to him, being accountable only if he invaded the quantity which belonged to the other." The action in that case, related to a quantity of wheat in store. The same principle is also recognized and held by the same court, in *Clark v. Griffith* (24 N. Y., 595). In that case, the defendants had severed and taken away their share by their own act merely, and then took the remaining share also which belonged to the plaintiff. It was

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held that the action of trover could be maintained in such a case for the taking merely without any demand and refusal.

We are, therefore, clearly of the opinion that the action was well brought, and the plaintiff entitled to recover the value of his share of the oats, with interest by way of damages.

As to the objection that the recovery in the County Court is for a greater amount than it was before the justice, or than was claimed in the complaint before the justice, we are of the opinion that it is not well taken. It is made here upon the argument, so far as appears, for the first time. No such question was raised upon the rendition of the verdict in the County Court, or at any other time in that court. The County Court had jurisdiction of the action, and the amount of the verdict is not beyond their jurisdiction. The case does not show whether or not the complaint was amended in the County Court, to correspond with the verdict, and there is nothing before us on which any question can be raised of this kind.

The judgment of the County Court must therefore be affirmed.

Judgment affirmed.*

JAMES ARMSTRONG, Appellant, *v.* ALFRED BICKNELL,
Respondent.

(GENERAL TERM, SEVENTH DISTRICT, MARCH, 1869.)

An agreement for the cultivation of a farm on shares, dated March, 1866, provided, that the defendant's assignors should "have one-third of all crops grown upon the above mentioned farm, for one year;" with no other

* The following note by Judge JOHNSON was added after the above decision had been given. [RER.]

"Since this case was decided, the case of *Loddell v. Stowell* (37 How. Pr. R., 88), has fallen under my notice. It was not cited or referred to upon the argument, but is nearly identical in facts with this case. The opinion of the county judge is well reasoned, and as his decision appears, from the report of the case, to have been affirmed by the General Term of the sixth district, it was an authority binding upon our court, and ought not to have been overlooked. I refer to it here as a conclusive authority in favor of our conclusions on the question of conversion."

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specification respecting the term.—*Held*, such construction according with the apparent intention of the parties to the agreement as indicated by their subsequent acts, that the defendant was entitled to a third of wheat sown by him in the fall of 1866, which matured in the summer of 1867.

When a specific exception is taken to an erroneous conclusion of law, founded upon a clear and indisputable fact found by the referee, and on which alone he bases his erroneous conclusion, the appeal must be determined on the exception, and the court will not review the evidence nor presume other facts to have been found by the referee, in order to sustain the judgment.

APPEAL from a judgment on the report of a referee. The complaint averred the conversion of a quantity of winter wheat, the plaintiff's property, by the defendant, on the 15th August, 1867. The answer denied each and every allegation of the complaint, and set up a sale of the wheat to the defendant on the 9th July, 1867, under a judgment in his favor against one Clute, recovered April 13th, 1867, upon which execution had been issued, and levy made.

The plaintiff proved an agreement between the defendant and one Clute, dated March 1st, 1866, by which the defendant had let his farm to the latter to be worked on shares, "under the following consideration, viz.: That the said party of the second part shall have one-third of all the crops grown upon the above named farm for one year, excepting twenty-five acres of wheat owned by the party of the first part," and with various unimportant provisions, but without any further mention of the time during which the agreement should continue. He also proved by Clute, that the wheat in question had been "sown under that agreement," and that the latter had, by an assignment dated April 4, 1867, sold his interest in the crop of wheat so sown, to him (the plaintiff), Clute agreeing to harvest and thrash the wheat, and to deliver his share to the plaintiff. This assignment was made in consideration partly of cash paid at the time, and partly of the surrender of a note, upon which a balance of forty dollars, with some accrued interest, was due from Clute to the plaintiff. It also appeared that Clute at

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the time of the assignment had assets barely sufficient to meet his liabilities.

When Clute went to harvest the wheat in July, 1867, the defendant refused him permission ; and afterward the defendant gathered the crop, thrashed, and converted it to his own use.

The referee found the agreement between the defendant and Clute as proved, and also the sale of his interest in the wheat in question to the plaintiff, for a sufficient consideration, and in good faith, and without intent to hinder, delay, or defraud creditors, and a conversion of the interest of Clute under the agreement by the defendant. He also found as a conclusion of law, that Clute had no right, title, or interest in the wheat at the time of his transfer ; and that the wheat growing upon the defendant's farm belonged to the latter at that time, and ordered judgment in favor of defendant.

Adams & Strang, for the appellant.

Abbott & Sill, for the respondent.

Present—JOHNSON, DWIGHT, and J. C. SMITH, JJ.

By the Court—JOHNSON, P. J. It is very clear that this judgment cannot be sustained upon the ground on which it was ordered by the referee. He places his decision upon the sole ground that Clute, the plaintiff's vender, had no interest in the crop of wheat growing on the defendant's premises on the 4th of April, 1867, when he sold and assigned his interest therein to the plaintiff. The referee finds as matter of fact that the crop was put in by Clute, under and in pursuance of the agreement between him and the defendant, and that the plaintiff was a *bona fide* purchaser for a valuable consideration without any intent to hinder, delay or defraud Clute's creditors. He treats the sale or assignment as valid and sufficient to vest in the plaintiff all the right and title Clute might have had, not only as between them, but as

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against the creditors of Clute also. From these premises he deduces the legal conclusion that the plaintiff took nothing by his purchase for the reason that Clute had no interest in the off-going crop, but that the whole belonged to the defendant, who owned the farm, as matter of law. This is the whole case, as made and considered by the referee in his findings of fact and conclusions of law. It is apparent that the referee was quite mistaken in his views of the law applicable to the facts found by him in the case. The agreement between the defendant and Clute, though in form in part a lease, was not a lease which created the legal relation of landlord and tenant between the parties to it. It was a mere agreement by which Clute was to work the farm on shares for a single crop. In one sense the parties worked the farm together. The defendant was to furnish teams to do the work and all the seed, and Clute was to do the manual labor and the overseeing and have one-third of all the crops raised for his share, and the defendant was to have two-thirds for his share, after it was harvested and ready for use. Clute was thus a mere cropper and a tenant in common with the defendant in all the crops put in and raised, under the agreement, according to all the cases. (*Foot v. Colvin*, 8 John., 216; *Bradish v. Schenck*, 8 id., 151; *De Mott v. Hagerman*, 8 Cowen, 220; *Putnam v. Wise*, 1 Hill, 234; *Dinehart v. Wilson*, 15 Barb., 595; *Fobes v. Shattuck*, 22 id., 568; *Tanner v. Hills*, 44 id., 428.) The form of the agreement is of no consequence. It is the substance which determines its legal character. The quantity or portion of the crop to which the defendant was entitled, according to the agreement, was not by the terms thereof to be paid as rent, but it was to be delivered to him, as his fixed proportion, of whatever might be raised, more or less.

The crop in question, was put in by the parties to the agreement, and "in pursuance of it," as the referee expressly finds. It was put in as a fall or winter crop, the defendant doing and furnishing his share, according to the agreement and Clute his share. The only words of limitation or restric-

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tion, found in the agreement are, "the said party of the second part shall have one-third of all the crops grown upon the above mentioned farm for one year," excepting the crop of winter wheat then growing on said farm. These words of limitation the referee has so construed, as to work a forfeiture of the rights of Clute, at the expiration of the year, from the date of the agreement, which was the 1st of March, 1866. This in view of the acts of the parties under the agreement, is an exceedingly strict and harsh construction, which ought not to prevail if the rules of law will admit of a different one more in consonance with justice, and the plain understanding of the parties, when the crop was planted, and the ground prepared therefor. It is to be observed that no specific term is created by the lease, or any where spoken of, and nothing is specified as to when possession was to be surrendered by Clute. All there is by way of time, is what is above referred to. It is quite clear, therefore, that the parties intended by that limitation, to restrict the operation of the agreement, to a single crop of any one kind, sown or planted, which should mature in one year after such sowing or planting. This was the interpretation which the parties put upon the limitation by their acts, before any conflict of interest arose, to give a different turn to their claims. Indeed this seems to have been the defendant's understanding, when his answer was put in. "Crops grown upon the above named farm for one year," are the terms used. It is not said, "grown within one year from the date of the agreement" and obviously was not so intended. The limitation is applicable to the growth of the crop; crops of one years growth and not over. This construction does no violence to the rules of language, or to the rules of law, and is most clearly consistent with justice, and the understanding and intention of the parties at the time the agreement was entered into, and while they were performing their several obligations to each other under it. (2 Parsons on Con., 11, § 3). It is clear, therefore, that Clute, at the time he undertook to assign and transfer his interest in the growing crop to the plaintiff,

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had an interest therein which was the subject of sale and transfer; and the referee erred in holding that he had not. This would dispose of the case, and lead necessarily to a reversal of the judgment if there were no other facts proved upon the trial. But there were other facts essential to the merits of the case, upon which evidence was given, and much of which is uncontroverted, but in reference to which the referee in his report has determined nothing, as to which is established by such evidence, one way or the other. It remains to be seen what effect this is to have on the case, as it is thus presented to us. So far as the referee has gone in his finding of facts, we have seen that they do not sustain his conclusions of law, and the appellant has shown that he was in error. Should we reverse the judgment and order a new trial for this error, or should we examine the case for the purpose of ascertaining whether there are not other facts proved and which the referee ought to have found in the defendant's favor, and embodied in his report of the facts found from the evidence, which would have sustained his general conclusion of law, that the defendant was entitled to judgment.

In a case like this, where a distinct exception is taken to the conclusion of law, we must, I apprehend, review upon the exception, as we would in the case of an erroneous charge to a jury at the circuit to which exception had been taken. Here, a distinct and specific exception is taken to the first conclusion of law, drawn by the referee, from the fact found, and we must determine whether such exception was well taken. *Buckingham v. Payne* (36 Barb., 81); and in *Smith v. Devlin* (23 N. Y., 365). MASON, J., in delivering the opinion of the court, says: "It must appear that the facts found, justify the judgment, where there is an exception taken to the conclusion of law, which the referee has drawn from the facts," or the judgment should be reversed.

There are cases where the court will presume that the referee found other facts necessary to sustain the judgment, if the evidence would admit of it. But this I apprehend cannot be done, where a specific exception is taken to an erroneous con-

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clusion of law, founded upon a clear and indisputable fact found by the referee, and on which alone he bases his erroneous conclusion of law.

The question whether, under the instrument of sale by Clute to the plaintiff, the interest of the former vested in the latter immediately upon its execution and delivery, has not been considered or determined by the referee, and is not here for review. The defendant might have had that question in this case, by the findings of the referee, had he desired it. I do not think we should undertake to determine, as the case now stands, upon the report of the referee, what the rights of these parties are in respect to their claims to this property, through Clute, as purchaser and judgment creditor, respectively. On that question we express no opinion. The referee has found nothing in respect to the defendant's purchase of the interest of Clute, or in respect to a sale of such interest, by virtue of his judgment and execution, deeming it wholly unnecessary, as it was in his view of the case.

The judgment must therefore be reversed, and a new trial ordered, with costs to abide the event.

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GILBERT NICHOLS v. SIDNEY MEAD.

(GENERAL TERM, SEVENTH DISTRICT, MARCH, 1870.)

It is well settled, that after a mortgagee of chattels has taken possession of the mortgaged property, by virtue of a power in the mortgage, the mortgagor has no remaining interest in it, which can be seized and sold under execution, even though the mortgage debt is not due.

The amount secured by chattel mortgage was less than the cost of the property mortgaged; the provision for sale restricted the mortgagee to sales at cost price; there was provision for immediate possession and sale, and for return of the surplus property after sales sufficient to pay the debt, and the condition was for payment within a year.—*Held*, the mortgagee having taken possession, that the mortgagor had no leviable interest in the property mortgaged, though within a year from the date of the mortgage.

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Where the complaint alleged the taking of goods "particularly mentioned in the affidavit heretofore served upon the defendant in this action."—
Held, that the affidavit was, for the purpose of describing the goods, made part of the complaint.

THE plaintiff sued to recover possession of various articles of merchandise, alleging in his complaint that the same were of the value of \$2,500, and particularly mentioned in the affidavit heretofore served on the defendant, &c. He gave bonds and obtained possession. The defendant pleaded a levy, as sheriff, on the 25th July, 1868, under execution against the mortgagor, upon judgment bearing date July 21, 1868, for \$276.79, on a debt due before July 13, 1868:

Upon the trial plaintiff proved a chattel mortgage, bearing date June 13, 1868, executed to him by one Green, being upon merchandise inventoried, upon a schedule annexed thereto, at cost prices, in the aggregate at the sum of \$3,208.81. It recited various debts due from Green to the mortgagor, amounting to a total of \$2,800, and transferred to him the property inventoried under provisions as follows, viz.: "Provided always, and this mortgage is on the express condition that the said mortgagor shall pay to the said mortgagee, the just and full sum of all moneys which he, the said Nichols, has necessarily paid or shall necessarily pay on account, and by reason of all and singular, the obligations and responsibilities incurred or assumed by the said Nichols, for or on account of the said mortgagor up to the date hereof, and the necessary costs, charges and expenses hereinbefore mentioned, with interest thereon, in one year from date hereof, then this transfer shall be so far void that whatever of said property shall be or remain in the hands or control of said Nichols, at the time of the payment, so as aforesaid provided and conditioned to be paid by said mortgagor (and which the said mortgagor covenants to pay), together with the fair costs or purchase price of whatever of said property shall have been sold or disposed of by said Nichols, prior to such payment by said mortgagor, shall, on demand of said mortgagor, be returned, restored, given up and paid by said Nichols to said mortgagor."

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"And for the greater security of the said Nichols, it is further provided, that the said Nichols may, at his option, take immediate possession of said property, and also of the store No. 121 Genesee street, where the same now is, and occupy said store as freely and fully as I may or do, or might under the lease which I have of the same, during the lifetime of this mortgage, and said Nichols may immediately sell and dispose of said property at public or private sale, and continue so to do, at the best price to be had, not less than the original cost price of the same, except as to odds and ends and remnants, until he shall have derived or realized therefrom, money sufficient to meet, satisfy and fulfill the before mentioned purpose and object of this instrument, and without the let, hindrance or interference of said mortgagor, and to his exclusion from all control, voice or management."

The plaintiff also proved by Green that immediately after executing the mortgage, the plaintiff had required him to give possession, and that he had thereupon surrendered possession of his store, and the goods therein, to the plaintiff, and that some days after the defendant levied on the goods so in the plaintiff's possession; that at the time of the levy, all the goods named in the schedule of the mortgage were in the store, except some sixty dollars worth thereof, which had been sold, part of which were specified, and that no inventory was taken at the time of the levy, or when they were replevied by plaintiff. The defendant moved for a nonsuit upon grounds which sufficiently appear in the opinion of the court, which was granted, and the plaintiff moved upon a case and exceptions for a new trial. Defendant was served with the affidavit (Code, § 207) referred to in the complaint.

G. O. Rathbone, for the plaintiff.

F. G. Day, for the defendant.

Present—JOHNSON, E. D. SMITH and J. O. SMITH, JJ.

By the Court—JOHNSON, P. J. The action was to recover possession of certain goods and chattels which the plaintiff

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claimed as mortgagee of Frank B. Green. The defendant levied upon the property by virtue of an execution in his hands as sheriff of Cayuga county, issued upon a judgment against Green in the Supreme Court in favor of certain creditors. At the time of the levy, the plaintiff was in possession of the property by virtue of his mortgage.

The plaintiff at the close of his evidence was nonsuited. The nonsuit was right if Green, the judgment debtor, had at the time of the levy, an interest in the mortgaged property, which was subject to be taken and sold on execution. Otherwise the nonsuit was erroneous, and a new trial must be granted. It is well settled, that after a mortgagee has taken possession of the mortgaged property, by virtue of a power in the mortgage the mortgagor has no remaining interest in it, which can be seized and sold on execution, even though the mortgage debt is not due. The interest of the mortgagors is then but an equity of redemption, which is not the subject of seizure and sale on execution. (*Mattison v. Baucus*, 1 N. Y., 205; *Galen v. Brown*, 22 id., 37; *Hall v. Sampson*, 35 id., 274.) It is claimed on the part of the defendant, that by the terms of the mortgage, the mortgagor had a reserved interest in the property to the amount of \$408. 81. But nothing of this kind appears on the face of the instrument, or by the parol evidence. The mortgage, by its terms, transfers the entire property to the plaintiff subject only to the condition, of payment in one year, which the mortgagor undertook in terms to perform. This transferred the entire legal title to the goods, to the mortgagee, subject to be defeated by payment. (*Butler v. Miller*, 1 N. Y., 496.) When payment is made according to the condition of the mortgage, the title reverts to the mortgagors in every case. That is one of the incidents of a defeasible sale. But this is quite different from a reserved interest, which is subject to the claims of the creditors of the mortgagor on execution. By the terms of this mortgage, the mortgagee had the right to proceed and sell forthwith, at prices not below the cost price (except in the case of remnants), to

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raise funds, to meet the liabilities as they should fall due respectively, and when the debt was paid, the residue remaining unsold reverted to the mortgagor. But, as in every other chattel mortgage, the title to the entire stock, is in the mortgagee until the debts are paid. It is clear, therefore, that Green, the mortgagor and judgment debtor, had no interest in the mortgaged property, which was the subject of levy and sale by execution.

If there was any question as to the fact of the plaintiff's possession, or of fraud in the making of the mortgage, as respects the creditors of the mortgagors, it was a question for the jury to determine and not for the court. I do not see that any question properly arises here, upon the complaint, or in regard to the identity of the property levied upon by the defendant, and replevied from him by the plaintiff. The complaint alleges the taking of the store of goods, particularly mentioned in the affidavit theretofore served upon the defendant in the action. The affidavit, for the purpose of describing the goods particularly, is thus made part of the complaint, and contains a schedule in detail of the various kinds and items. The taking of these goods is justified by the defendant's answer. No question was made upon the trial, that the same goods levied upon, were not in fact the goods which were taken and redelivered to the plaintiff, by virtue of the process and proceedings in this action. All the evidence in regard to the identity of the property, was out, when the plaintiff rested, and I am unable to perceive that there was any room for doubt as to what property had been levied upon, and replevied from the defendant.

I am of the opinion, therefore, that the plaintiff, as the case stood, was entitled to recover, and that the nonsuit was erroneous.

A new trial should therefore be granted with costs to abide the event.

New trial granted.

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WILLIAM MCGARRY, Plaintiff in Error, v. THE PEOPLE,
&c., Defendant in Error.

(GENERAL TERM, SEVENTH DISTRICT, MARCH, 1870.)

If an indictment shows a presentment by jurors "of the number and qualification required by law," the names or number of the jurors need not be stated therein or in the caption.

And if it is stated that the jurors were "then and there in said court, &c., duly sworn," and presented the defendant upon their oaths it sufficiently appears that the presentment was upon the oaths so sworn.

In an indictment for injuring the property of a corporation, the corporation may be described by its usual and ordinary title, though different from its corporate name.

On the trial of an indictment under § 4, 2 R. S., 667, for setting fire in the night to a certain dwelling, the property of an incorporated company, "erected for the manufacturing of woolen goods," it is proper to prove by the president of the company that the building fired was intended as a manufactory for such goods, though it was not at the time completed and used as such.

And if the building was erected for such a manufactory, though not yet in fact appropriated to that purpose, there may be a conviction.

Whether the erection has progressed sufficiently to constitute a building within the statute, is, it seems, a proper question for the jury.

It seems that the statute distinguishes buildings of the latter class from those elsewhere mentioned in the section.

A structure raised, roofed, inclosed on two sides, with its floors partly laid and window frames in without sashes:—*Held*, to be a building "erected" within the intent of the statute.

A prisoner sworn as a witness upon his own trial, under chap. 678 of the Laws of 1869, waives the constitutional protection (art 1, § 6) by which no one may be "compelled in any criminal case to be a witness against himself," and may be examined upon any matter pertinent to the issue.

THE defendant obtained a writ of error to the County Sessions of Seneca county after his trial and conviction therein upon an indictment for arson in the third degree, which was as follows, viz.:

"At a Court of Oyer and Terminer, held for the county of Seneca, in the State of New York, on the 29th day of September, one thousand eight hundred and sixty-eight, at

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the court-house in the village of Ovid, in said county, before the Hon James C. Smith, one of the justices of the Supreme Court of said State, presiding; and the Hon. George Franklin, county judge of said county, and Thaddens Bodine and James D. Rogers, justices of the peace of said county, members of the Court of Sessions of said county of Seneca, duly authorized and empowered by the laws of said State to hold said court, to inquire by the oaths of good and lawful men of the said county, of all crimes and misdemeanors, committed or triable in said county, and to hear and determine divers of such crimes and misdemeanors, it is presented:

SENECA COUNTY, ss.:

The jurors for the people of the State of New York, in and for the body of the county of Seneca, in said State, each and all of them, and of the number and qualification required by law, good and lawful men of the said county, then and there in said court being duly sworn and affirmed, and charged to inquire, for the people of the State of New York, and for the body of the said county of Seneca, upon their oaths and affirmations, present, that William McGarry, late of the town of Seneca Falls, in said county of Seneca, on the fourteenth day of September, in the year one thousand eight hundred and sixty-eight, at the town of Seneca Falls, in said county of Seneca, feloniously, unlawfully, willfully and maliciously, in the night time of said day, did set fire to and burn a certain building erected for the manufactory of woolen goods, there situate and belonging to the Phoenix Mills Company, a corporation duly organized under the statutes of the said State of New York as a manufacturing company, against the form of the statute in such case made and provided, and against the peace of the people of the State of New York and their dignity.

And the jurors aforesaid, on their oaths aforesaid, do further present, that William McGarry, late of the town of Seneca Falls, in said county of Seneca, on the fourteenth day of September, in the year one thousand eight hundred and

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sixty-eight, at the town of Seneca Falls, did willfully, feloniously, unlawfully and maliciously set fire to and burn a certain warehouse belonging to the Phoenix Mills Company, a corporation duly organized under and in pursuance of the statutes of the State of New York for manufacturing purposes, there situate, the said warehouse not being adjoining to or within the curtilage of an inhabited dwelling-house, so that such house should be endangered by said firing, against the form of the statute in such case made and provided, and against the peace of the people of the State of New York and their dignity."

Before pleading, the prisoner, through his counsel, moved to quash the indictment, for the reason that neither the caption nor body thereof showed that the persons who found the same were of the number required by law. Also for that it did not appear that the indictment had been found by a grand jury. The court denied the motion and the defendant excepted.

The prisoner's counsel then moved the court to quash the first count of the indictment, on the ground that it did not appear that in presenting the prisoner on such count the jurors acted upon the oaths and affirmations which they had then and there taken in open court, and he claimed that the omission of the word "said" or other word or words showing the presentment to have been upon the oaths and affirmations then and there made in open court, was fatal to the said count. The motion was denied, the defendant excepted, and thereupon pleaded not guilty.

On the trial the plaintiff gave in evidence a certificate of incorporation of "The Phoenix Mills of Seneca Falls," and proved by the president of the company that a new wooden building belonging thereto at Seneca Falls village had been fired on the night of September 14th, 1868.

This witness was also permitted to state, on the plaintiff's examination, and under the defendant's objection as to the competency and sufficiency of the evidence, and his exception, that the building was erected for the purpose of manufacturing

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woolen goods and the storage of material. Also, that at the time of the fire it was used for the storage of lumber designed for making boxes for packing goods.

Testimony was also given on the part of the plaintiff by this and by other witnesses, under the defendant's objection to its immateriality and incompetency and exception, showing the name ordinarily given to the company to be the same as laid in the indictment, viz.: "Phoenix Mills Company."

Other evidence was then given for the purpose of connecting the prisoner with the firing of the said building, which was shown to be incomplete at the time, but so far progressed that the frame had been raised and roofed, two of its sides boarded, its window frames without sashes put in, and its flooring in part laid, and workmen were engaged upon its further construction.

It appeared that certain copies of notices for a meeting of a hose company, which the defendant was shown to have been distributing on the day preceding and night of the fire, were found upon the premises in the vicinity of the place where it occurred; and the defendant, having offered himself and been sworn as a witness, and given testimony in his own behalf respecting his whereabouts on the night in question, and also respecting his serving the notices, he was asked on cross-examination whether he was secretary of the hose company whose notices were so served and found on the premises. To this question the defendant's counsel objected, on the ground that it was not a cross-examination upon matter testified to by the prisoner on his direct-examination, and was therefore improper. The court overruled the objection and the defendant's counsel excepted, and the defendant answered that he was acting secretary at the time. The prisoner was also asked upon his cross-examination by the plaintiff's counsel and permitted to answer under the same objections, and an exception to the ruling, the question, "Were you on the street the next day?" and answered the same affirmatively. The case was submitted to the jury under a charge

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from the court, the material parts of which appear from the following opinion.

P. H. Van Auken, for the plaintiff in error.

William C. Hazelton, district attorney, for the defendant in error.

Present—JOHNSON, J. C. SMITH and DWIGHT, JJ.

By the Court—JOHNSON, P. J. The caption is no part of the indictment, and it is unnecessary either in the caption or in the body of an indictment to state the names or the number of the grand jury. It is sufficient if the indictment shows upon its face that the grand jury were of the number and qualification required by law, as it does here. (*People v. Bennett*, 37 N. Y., 117). The question in that case, arose upon motion to quash the indictment, for the same alleged defect. It appears upon the face of the indictment that the grand jury were duly sworn and presented the defendant on their oaths. It was proper to show the name which the corporation owning the property was generally known by. The building was alleged in the indictment to belong to the "Phoenix Mills Company." The name of the corporation as it appears in the certificate of organization is "The Phoenix Mills of Seneca Falls." That is, therefore, its legal name. But in an indictment if the name of the person stated as the one injured, is the name by which he is usually known it is sufficient, although that is not his real name. (Arch. Crim. Pl., 31, 3d Am. ed.) There is no good reason why this well settled rule should not apply to the name of a corporation as well as to that of an individual. If the description of the party injured is sufficient to inform the prisoner who are his accusers, or whose property he is accused of having taken or injured, that is enough. (1 Chit. Crim. Law, 211.)

It was also proper to prove what the building injured was erected for. It was alleged in the indictment to have been

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erected for the manufacturing of woolen goods. But it had not been completed, so that it could not be used for that purpose at the time of the fire. There was no other way of proving what it was erected for except by parol. The president of the company was the most suitable person to prove the fact by. It was proper for the district attorney to inquire of the defendant if he was not secretary of the hose company, on his cross-examination, and the objection to the inquiry was properly overruled. It was not compelling him "to be a witness against himself" within art. 1, section 6, of the constitution of this State. He was a volunteer witness under the provisions of chap. 678 of the Laws of 1869. He was not only a volunteer, but had taken the necessary oath to enable himself to testify, "to tell the truth, the whole truth, and nothing but the truth" upon the whole issue of traverse between himself and the people. He could not have been compelled to give evidence at all; but when he made himself a witness, under the privilege conferred upon him by this statute, he waived the constitutional protection in his favor and subjected himself to the peril of being examined as to any and every matter pertinent to the issue. Any other construction would render this statute the most effectual shield to crime and criminals which could possibly be devised.

The charge of the judge to the jury that if the building was "so far advanced in its construction as to have assumed the form and character of a building, and to be properly denominated a building," it was the subject of arson, within the meaning and intent of the statute, was, I think, correct. It was left to the jury to say as matter of fact whether it was advanced to that stage. The statute (2 R. S., 667, § 4) designates several buildings which are made the subjects of arson in the third degree, when "set fire to or burned in the night time," as "the house of another not the subject of arson in the first or second degree," "any house of public worship or any school-house," "any public building belonging to the public," &c., "any barn or grist mill," "any building erected for the manufacturing of cotton or woolen goods, or both, or

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any paper, iron, or any other fabric," or "any fulling mill." It is not necessary that the building, in a case like this, shall be a woolen or a cotton factory, or a manufactory of any other fabric when set on fire. If it has been *erected* for that purpose it is enough. The statute plainly distinguishes between buildings of that class and other buildings mentioned in the same section. In the latter case the statute plainly imports buildings completed and used, or capable of being used at the time of being fired, for the designated purpose. Not so in regard to buildings of the kind in question. The object of the statute, doubtless, was in regard to such buildings to furnish more ample security to persons about to embark in that kind of business as matter of public policy. The only question of fact, then, was, in this aspect of the case, whether this at the time was a building erected, and erected for the designated purpose. The evidence, I think, shows most clearly that at the time it was a building. It had been raised or erected and covered by a roof, and inclosed on at least two sides, with a portion of the floors laid, and all the window frames in, but not the sashes. In short, it was an erected building, but not a completed building; and having been erected for the purpose of manufacturing, was the subject of arson under the statute. The words "erected" and "completed" are words of quite different signification, and there is no reason for supposing that the former was used in the sense and to express the meaning of the latter in the statute. None of the exceptions to the charge or to the refusal to rule, or to charge as requested, are well taken. The conviction was, therefore, right, and should be affirmed, and the case remitted to the Court of Sessions of Seneca county to have the proper sentence pronounced.

Ordered accordingly.

NOTE.—It is held by the Court of Appeals in *Brandon v. The People, &c.*, decided June 21st, 1870, that a prisoner who testifies on his own behalf, is subject to a like cross-examination with other witnesses. [REP.]

Watkins v. Rush.

JAMES P. WATKINS, Appellant, v. RUSSELL M. RUSH,
Respondent.

(GENERAL TERM, SEVENTH DISTRICT, SEPTEMBER, 1869.)

Upon a sale without writing, of standing grass, the vendee paid the whole price, entered, cut, and removed a portion of the crop, when he was stopped by the vendor.—*Held*, that the vendee was not entitled to recover the sum paid without allowance for the grass taken.

The complaint claimed damages for non-delivery of the grass, the answer was a general denial and plea of the statute of frauds.—*Held*, that evidence of the quantity of grass removed, was competent upon the question of damages.

THIS was an appeal from a judgment of the Ontario County Court, reversing the judgment of a Justice's Court upon the verdict of a jury.

The complaint before the justice was in writing, and upon a contract made with the defendant for sale of standing grass, and it demanded damages for a refusal to deliver the same, or allow it to be cut according to the contract. The answer denied each and every allegation of the complaint, and averred that the alleged contract was for a sale of real estate, and void by the statute of frauds.

It appeared that the plaintiff had purchased the grass in question, without written agreement, of the defendant, for the sum of twenty-five dollars, which he (plaintiff) paid, and afterward entered upon the land, and mowed and removed part of the grass, but while he was mowing the remainder, the defendant interfered and prevented him from continuing to cut or harvest it. The justice excluded evidence offered by the defendant to show the quantity of hay removed, as immaterial and improper, and the defendant excepted. The plaintiff had a verdict for the full amount paid for the grass; the defendant appealed, and the judgment was reversed in the County Court, and thereupon this appeal was taken by the plaintiff.

H. O. Cheesebro, for the appellant.

Metcalf & Field, for the respondent.

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Present—E. D. SMITH, JOHNSON, J. C. SMITH and DWIGHT, JJ.

By the Court—DWIGHT, J. The parol contract for the sale of the standing grass was void by the statute of frauds, so far as that it could not have been enforced by either party, but it was not illegal, and the parties were at liberty to perform it, if they saw fit. The plaintiff had received a portion of the property. He cannot maintain his action to recover the whole of the purchase price without making restitution, or compensating the defendant for the benefit which he has received. Honesty and fair dealing forbid it. (*Abbott v. Draper*, 4 Denio, 51.)

Besides, the action, as stated in the complaint, was not to recover back money paid under a void contract, but for damages by reason of the non-delivery of the grass by the defendant. The answer was sufficient to put in issue the amount of damage sustained by the plaintiff, and evidence of the amount of hay received by him was competent on the question of damages.

In either view of the case, therefore, the justice erred in excluding the evidence of the amount of hay received by the plaintiff, and in instructing the jury that the plaintiff was entitled to recover the whole of the purchase price paid.

The judgment of the County Court must be affirmed.

All concurring. Judgment affirmed with costs.

MARIA E. MENSCH, Respondent, v. NANCY J. MENSCH,
Executrix, &c., of CHRISTIAN MENSCH, Appellant.

(GENERAL TERM, SEVENTH DISTRICT, JUNE, 1869.)

The plaintiff brought a suit on the 2d December, 1867, to recover upon an annuity, charged in his favor on the defendant, from January 1st, 1855, and the complaint averred that no part of the annuity had ever been paid. The defendant pleaded the statute of limitations. On the trial

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the plaintiff proved, without objection, a payment by the defendant on account of the annuity on the 1st January, 1864.—*Held*, that the referee was justified in reporting in the plaintiffs favor for the sums falling due after January 1st, 1858.

APPEAL from judgment on report of referee, in favor of plaintiff. The action was brought to recover from the defendant as executrix, &c., of Christian Mensch, certain sums claimed to be due upon an annuity of eighty-four dollars under the will of the father of defendant's testator. The answer denied various allegations of the complaint, and set up the statute of limitations. The referee found for the plaintiff for \$1,120, being the annuity and interest estimated from January 1st, 1858.

G. F. Danforth, for the appellant.

G. E. Pritchett, for the respondent.

Present—E. D. SMITH, JOHNSON and DWIGHT, JJ.

By the Court—DWIGHT, J. The will of John Mensch absolutely disposed of all his personal estate, and, therefore, such personal property was exonerated from, and the real estate charged was primarily liable for the legacy in question. (*How v. Van Hoesen*, 1 Coms., 120.)

The devise to Christian Mensch was upon the express condition that he pay the annuity, and its payment, therefore, became a personal charge on the devisee, upon his acceptance of the devise. (*Dodge v. Manning*, 1 Coms., 202; *Kelly v. Western*, 2 Coms., 500.)

The referee has found the fact that the devisee did accept the devise, and there is sufficient evidence to support the finding.

The only remaining question is, whether recovery of any installments of the annuity was barred by the statute of limitations.

The first installment fell due on the 1st day of January,

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1855, and the succeeding installments at the end of every three months thereafter. The action was commenced on the 2d day of December, 1867. The statute therefore had run against more than one-half of the installments unless some payment had been made in the mean time, which operated to take the case out of the statute. The referee found, on proof which seems to have been sufficient, that a payment of twenty dollars had been made, on account of the annuity, on the 1st day of January, 1864, and held that this payment saved the claim for all the installments, falling due within six years prior thereto, from the operation of the statute.

To this conclusion it is objected by the appellant that the plaintiff had alleged in her complaint that no payment had ever been made of the annuities claimed, nor of any part thereof, and it is urged that this allegation must be taken as conclusive against her upon the question to which it relates, and must deprive her of the benefit of the proof of such payment to take the case out of the statute of limitations.

But the case presented is simply one of variance between pleadings and proof, and if an objection had been made to the evidence at the time it was offered, would have called for a ruling by the referee as to whether it was a material variance within the definition of the Code. By that definition (Code, § 169), no variance shall be deemed material unless it shall actually have misled the opposite party to his prejudice; and that it has done so must be made to appear by proof to the satisfaction of the court, whereupon an amendment may be allowed upon such terms as the court shall impose.

In this case no objection having been made to the evidence offered, and no allegation that the defendant was misled by the averment in the complaint, it was proper for the referee to disregard the variance and find the fact according to the evidence.

The judgment must be affirmed.

All concurring. Judgment affirmed.

Clarkson v. Skidmore.

MATHEW CLARKSON v. WILLIAM L. SKIDMORE, Execntor, &c.,
of F. F. RANDOLPH, deceased, LEWIS W. PHILLIPS, WIL-
LIAM REMSEN, and others.

(GENERAL TERM, FIRST DISTRICT, NOVEMBER, 1869.)

A tenant for years has an equitable interest, to the extent of the value of the remainder of his term, in the surplus moneys arising upon a sale of the demised premises, under a mortgage given thereon, prior to his lease, where the lease is cut off by the foreclosure; and the court will order payment out of such surplus to him or to a mortgagee of his lease, after satisfaction of any dower right, or other prior claims upon the equity of redemption.

The decision in *Burr v. Stenton* (52 Barb., 377), held not to control the decision of this case.

THIS was an appeal from an order, entered upon the report of a referee, appointed to determine upon claims to surplus moneys, arising from a foreclosure sale, under a judgment therefor, in the action.

The mortgage was given, in his lifetime, by Franklin F. Randolph, deceased, upon premises in New York city, and was dated and recorded in October, 1864. There was paid in, to the city chamberlain a surplus, after satisfying the mortgage debt, &c., of \$85,046.91, upon which claims were made by the executors of Randolph, and by the defendants, Phillips, Remsen, and Hoyt assignee, &c., respectively. Phillips claimed as lessee of the premises, by lease from the mortgagor, dated in May, 1865, for the term of ten years, and Remsen and Hoyt assignee, &c., under first and second mortgages of the lease from Phillips. The widow of Randolph also claimed her dower. The lease to Phillips contained covenants for quiet enjoyment, and for payment of taxes by the lessee, and for rent quarterly; and for re-entry, in case of non-performance of covenants by the lessor; and it appeared that two years taxes had been paid out of the proceeds of the sale, and that a quarter's rent remained unpaid on the 3d May, 1869, at which time, upon demand of

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the purchaser, the tenant surrendered to him possession of the premises. Evidence was also given before the referee, of the value of the unexpired term cut off by the foreclosure suit, to which Phillips, Remsen and Hoyt as assignee, &c., were made parties.

The referee rejected the claims of Phillips, Remsen, and Hoyt, and reported in favor of paying the surplus after satisfying the claim for dower, expenses, &c., to the executors of Randolph. Exceptions to the report were filed; it was affirmed by an order of Special Term, from which this appeal is taken.

C. P. Kirtland, A. F. Cushman, and W. F. Allen, for the appellants.

W. E. Curtis, and J. M. Van Cott, for the executors.

Present—CLERKE, SUTHERLAND, and CARDOZO, JJ.

SUTHERLAND, J. It cannot be said, I think, that the Revised Statutes changed or abolished the common law meaning of the term *real estate*, when used as expressing, or with reference to, *the nature and quality* of the estate in land, as distinguished from estates in land for years, that is chattels real. (See 1 Revised Statutes, 722, §§ 1 to 6, both inclusive; 1 id., 750, § 10; 1 id., 754, 755, § 27.) Section 36 of chapter 3, of part 2d, relating to the proof and recording of conveyances of real estate, declares that the term *real estate* shall be construed "as embracing all chattels real, except leases, for a term not exceeding three years," *as used in that chapter*. That chapter (chap. 3) does not relate at all, to the nature, quantity, or divisions of estates in land, except with reference to the proofs and recording of conveyances of estates in lands. Therefore, in speaking of the nature and quantity of the estate or interest, which Phillips, the lessee, had in the demised premises at the time of the foreclosure and sale, it may not be technically proper or

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accurate to call his estate or interest *real* estate. But what of it?

By the common law, and by the Revised Statutes, he had an estate (though not *real*), in the land for the unexpired term of years, called at common law, and by the Revised Statutes, a chattel real. Equity regards the substance of things, not names, and I cannot see, of what possible materiality it is in this case, whether this estate is called or should be called *real* estate or a chattel real. It was an estate in the lands. It entitled him, as between himself and his lessor, to its use and occupation, rents and profits, during the unexpired term, upon or under the terms of the lease. It was destroyed or diverted by the foreclosure sale and conveyance, under a mortgage made by the lessor, before its creation. The conveyance to the purchaser, carried the fee absolute including the estate of the lessee. The moneys bid and paid for the premises, were bid and paid for a fee absolute, all the estate which could be had or held in the premises, including the unexpired term or estate for years of the lessee. I cannot see, why so much of the surplus moneys, as was paid for the lessee's estate, or as arose from the sale of it, should not be regarded in equity as representing, or as taking the place of his estate, and go to indemnify his mortgagees of the term, and him.

The holder of a judgment in a court of record against the lessee, would have had a claim on such part or portion of the surplus moneys, for such judgment would have been a lien on the lessee's term or estate. (2 Rev. Stat., 359, § 3.) The mortgagees of the lessee have a claim on such part or portion of the surplus moneys, for their mortgages gave them liens on the lessee's term or estate. It would be strange, indeed, if the lessee's mortgagees have a claim on such part or portion of the surplus, because their mortgages gave them liens on the lessee's unexpired term and estate, that the lessee, the owner of the unexpired term and estate itself, subject to the mortgages, should not be entitled in equity as between him and the executor of the lessor to what might be left of that part or

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portion of the surplus after paying his mortgagees of the term, considering the full and express covenant of the lessor for quiet enjoyment, and especially considering that an action at law on this covenant would give the lessee a very inadequate indemnity for the loss of his unexpired term indirectly by the very act of the lessor.

But the lessee and Remsen, his principal mortgagee of the term, were parties to the foreclosure action, and I think are bound by the price for which the premises were bid off and conveyed. Therefore, in ascertaining what part or amount of the surplus moneys should be regarded as having been bid and paid for the unexpired term of the lease, I think \$119,750 the amount which the premises brought at the mortgage sale should be taken as the value of the premises, or of a fee absolute in them, including the unexpired term of the lease. I cannot doubt that upon such assumption the value of, or how much of the surplus should be regarded as having been paid for the lessee's unexpired term, subject to the annual rent, liability to pay taxes, &c., I may say, subject to the terms of the lease, can be ascertained with reasonable accuracy. The opinions of witnesses as to the value of the lessee's unexpired term should not be resorted to, if such value can be ascertained by calculation on the assumption above stated with reasonable certainty.

In my opinion, after taking from the \$85,046.91, the amount of the surplus paid into court, the costs and expenses of this proceeding as to such surplus, including the costs of all parties to this appeal on this appeal and such reasonable and proper allowances for counsel, as the court shall have the power and feel authorized to make, and the ascertained value of the widow's right of dower, and the ascertained value of the lessee's unexpired term, less the \$750 rent in arrear, if anything should be left, the executor of the lessor would be entitled to it, but that the executor has no claim or lien on such surplus beyond such contingent residue.

As to the sum or amount to be ascertained as the value of the lessee's unexpired term at the time of the mortgage sale,

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it less the \$750 rent in arrear, should be appropriated, first to the payment of the Remsen mortgage in full; next to the payment of the mortgage held by Hoyt, assignee, in full, and whatever may be left of it, after paying these two mortgages, should be paid to Phillips, the lessee.

I do not think our decision of this case should be controlled by *Burr v. Stenton* (52 Barb., 389), considering the reasons given in the opinion in that case at General Term, for reversing the Special Term, and considering the special circumstances of that case.

The order appealed from should be reversed and the exceptions to the referee's report allowed with costs of all parties to this appeal, on the appeal, to be paid out of the surplus moneys, and the matter should be referred back to the referee, to proceed and report according to the views expressed in this opinion, and the order appealed from should be so reversed and matter referred back, without prejudice to counsel's right to make such application to the court for allowances as they may be advised to make.

Ordered accordingly.

BENJ. B. RORKE, Respondent, v. SALEM T. RUSSELL, President of the New York Mining Stock Board, Appellant.

(GENERAL TERM, FIRST DISTRICT, NOVEMBER, 1869.)

Where an injunction issued, and was served on the defendant, in an action against the president of an association, and purported to restrain him "as president" of the association, "its officers and members"—*Held*, that the associates, to whom the service was made known, and the summons, complaint and order were read at a meeting of the association, by its officers acting thereat, were amenable for contempt in taking proceedings contrary to the prohibitions of the injunction.

APPEAL by the defendant, from an order at Special Term, whereby he, together with certain other members, seventeen

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in number, of "the New York Mining Stock Board," were adjudged guilty of contempt, and fined as for disobedience to an order of Mr. Justice Cardozo, which, after requiring the defendant to show cause at Special Term why an injunction should not be granted as prayed in the complaint, ordered "that the said Salem T. Russell, as president of the New York Mining Stock Board, its officers and members, be, and they each of them are hereby enjoined and restrained, from suspending the plaintiff from his rights and privileges as a member of said board, because of" the matters set forth in the complaint.

The order appealed from, had been granted upon affidavits, from which it appeared, that after the order had been duly served upon the defendant personally, with the complaint, &c., while in the board room, he, the board being in session, informed the members present of the service, and thereupon vacated the chair and took no part in the further proceedings of the meeting. It also appeared that the secretary had, during the same session of the board, and after the service upon the defendant, read the summons, complaint and order served, aloud in the hearing of the members present, and that afterward a resolution had been passed by the board, to which the members adjudged in contempt as aforesaid had given their votes, or were present acting as members and made no opposition and did not vote against it, suspending the plaintiff from his membership of the board.

The members adjudged to be in contempt had presented affidavits that they had never been served with the summons, complaint or the order mentioned; but did not deny their presence or assent upon passage of the resolution of suspension.

T. C. T. Buckley, for the appellant.

A. J. Vanderpoel, for the respondent.

Present—CLERKE, SUTHERLAND and INGRAHAM, JJ.

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SUTHERLAND, J. I question, whether the appeal by the defendant, Russell, enables us regularly to review the order appealed from. No fine was imposed on the defendant Russell.

But considering his appeal, as sufficient to authorize us to review the order, I am of the opinion, that it should be affirmed.

None of the members or officers of the board, except Russell, the president, and the plaintiff, may have been parties to the action, and that may have been, or may be a good reason, why the injunction should not have issued against the other officers and members of the board, or why it should, or might have been vacated on motion, by or in behalf of such other officers or members, or any, or either of them; but this furnishes no excuse for the willful disregard of the injunction by the members fined, who were in part made parties *to the injunction*, and named in *it*, by the name or designation of "officers and members of the New York Mining Stock Board."

The order should be affirmed with costs.

Order affirmed.

BENJAMIN B. RORKE, Respondent, v. SALEM T. RUSSELL,
President of the New York Mining Stock Board, Appel-
lant.

(GENERAL TERM, FIRST DISTRICT, NOVEMBER, 1869.)

The acts of 1849 (page 389, chap. 258), and 1851 (page 838, chap. 455), in relation to suits against joint stock companies and associations, were intended to apply to suits having in view a remedy against the "joint property and effects" of such companies and associations.

When, therefore, an action merely seeks to restrain an unincorporated association by injunction, from carrying into effect its resolution of suspension against one of the members of the association, it is not within the meaning of said acts and is not well brought against the president of the association merely. (INGRAHAM, J., dissenting.)

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APPEAL from an order granted by Mr. Justice INGRAHAM, at Special Term, upon an order to show cause, and upon the pleadings and affidavits in the action, restraining the defendant, the "New York Mining Stock Board" and each and every of the officers and members of said board, until further order of the court, from enforcing a resolution adopted at one of its meetings, suspending the plaintiff from his privileges as a member of the said board for sixty days.

The complaint alleged, that the association was the owner of funds and securities, in the hands of its treasurer, and of furniture and fixtures, and that the action of the board, under the resolution in question, debarred the plaintiff from a voice in control of the said property, and impaired his rights in respect thereto, also, that the plaintiff owned a certain right or privilege in the association, known as "a seat" in the board, which he was, under its constitution, entitled to sell, and of which the value had been impaired, also, that his individual business was largely dependent upon the exercise of his rights, &c., as a member of the board.

It also appeared from the complaint, answer and affidavits, that the plaintiff was a member, and the defendant president, of the said "New York Mining Stock Board," an unincorporated association of more than seven members formed for the purpose of buying and selling stock and securities, to each other, and for principals for whom the members acted as brokers; that through trustees the association provided itself with a room for transaction of their said business, and, for the purpose of meeting expenses, the members paid an initiation fee upon entrance into the association, and afterward certain dues annually; that the members had covenanted and agreed together, to be bound by a constitution and by-laws, to which they had subscribed their names.

It also appeared from the pleadings and affidavits, that certain rules of conduct were laid down in the constitution for the preservation of order during the sessions of the board, and for the enforcement of said rules certain fines were prescribed, which were to be imposed by the president of the

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association, there were also certain provisions for admonitions to the members and suspensions from their memberships for one week, by the president, on account of any violation of the said rules; and every member signing the constitution thereby pledged himself according to the provisions thereof, to abide by it, and also by all by-laws, resolutions or rules, which might be passed by the board.

It also appeared that the plaintiff had been suspended, by a resolution of the board, for sixty days, for certain gross and violent and threatening language used by him, toward the vice-president of the board, with reference to the latter's conduct and decisions as presiding officer during a session of the board, immediately after an adjournment of such session.

The complaint prayed an injunction as before stated.

T. C. T. Buckley, for the appellant.

A. J. Vanderpoel, for the respondent.

Present—CLERKE, SUTHERLAND and INGRAHAM, JJ.

By the Court—SUTHERLAND, J. In my opinion, even the complaint does not make a case for the injunction. The complaint does not allege, that "The New York Mining Stock Board" is a corporation, nor that it was organized or existed, or is recognized under or by any legislative act or authority.

From the allegations in the complaint, or from what can be inferred from it, of, or as to its organization, business, and purposes, it is extremely doubtful, whether it should be regarded as a joint stock company or association, within chapter 258 of the Laws of 1849, or within chapter 455 of the Laws of 1851, extending the act of 1849. (See *Austin v. Searing*, 16 N. Y., 117, 118, &c.) But however this may be, it certainly may be said, that neither of these acts, were passed for the purpose of authorizing the formation of the joint stock companies, &c., within them; but it is evident

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that they were passed for the purpose of facilitating a certain class or kind of legal actions or remedies against them, that is, actions relating to, or by which a remedy is sought, as regards the "joint property and effects" of the company or association.

Now considering that the sole purpose of this action, as declared in the complaint, that the only relief (temporary or final) asked for, is, that the president of the board, its officers, and members, may be restrained from enforcing, the vote, resolution or action of the board, or of a quorum of its members, of the 18th December, suspending the plaintiff from his membership, or the rights and privileges of his membership for a certain number of days, I am inclined to think, that the action is not within either of the acts before referred to, that the plaintiff was not authorized by either of the acts, to bring this suit against the president alone, that it can not be regarded as a suit against the company, board, or association; and that no member of the board or association, other than the president, is, or can be regarded as a party to it; and if so, I think it follows, that the injunction could not regularly be issued against any one else. (*Fellows v. Fellows*, 4 John. Ch. R., 25; *Iveson v. Harris*, 7 Vesey, 256; *Dawson v. Princess*, 2 Anstr., 521; *Sage v. Quay*, Clarke's Ch., 347; 1 Barb. Ch. Pr., 632; *Watson v. Fuller*, 9 How. Pr. R., 425.)

And if the views expressed as to the purpose and effect of the acts of 1849 and 1851 are correct, it follows that the stock mining board must be regarded as a mere voluntary association, and that the plaintiff's membership of it is not, and cannot be, regarded as a franchise; and this being so, and there being nothing in the complaint to show that the proceedings of the board or of the quorum of the board complained of, were fraudulent or corrupt, or the result of a fraudulent conspiracy, I do not see how it can be said that the complaint makes a case for the equity jurisdiction of the court, even as against the president or as against the board, or as

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against the president and other members of the board, even conceding such other members to be parties to the action.

I must confess that I cannot see, on the facts stated in the complaint, upon what ground a court of equity could feel itself authorized or disposed to intermeddle with or trouble itself about the questions or subjects of conduct presented by the complaint in this action.

Moreover, this action is not brought to prevent the board or a quorum of the members of the board from resolving or voting to suspend the plaintiff from membership or its rights and privileges.

That act or proceeding, according to the complaint, had taken place before this action was commenced, and this action, as I have before said, is an action to prevent the enforcement of the act or proceeding of suspension, and yet though the plaintiff in his complaint in this action assumes and substantially alleges that the act or proceeding was unauthorized and absolutely void, it does not appear from the complaint that he has since the act or proceeding of suspension made any attempt to enter the room where the board does its business, or to exercise there or elsewhere any of the rights or privileges of a member.

The order granting the injunction should be reversed with costs.

CLERKE, P. J., concurred. INGRAHAM, J., dissented, and also gave an opinion as follows:

INGRAHAM, J. There is nothing in the constitution or by-laws which authorized a suspension of a member for sixty days. He may be fined and he may be suspended for a period not exceeding one week; the latter, however, can only be ordered by the president, after an admonition from the board.

The board might adopt a by-law, authorizing the suspension for a longer period, and might make misconduct at other places than at the meetings of the board, cause for suspension or expulsion; but to warrant such action, they should adopt such by-laws before the commission of the offence.

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As the by-laws now provide, no act outside of the board furnishes ground for suspension.

The 15th article of the constitution is referred to as requiring the members to abide by all by-laws, resolutions, or rules which may be passed by the board. This, however, can only be prospectively. It cannot be made to act upon matters which existed previously to the passage of the by-law or resolution.

The by-laws now make the right of membership a matter of property, and the member is not to be deprived of that right by an *ex post facto* resolution.

I think the order of suspension was unauthorized by the constitution or by-laws, and that the injunction should be granted.

Order reversed.

DANIEL W. WHITNEY and JERUSHA WHITNEY, his wife,
Appellants, v. RANDOLPH W. TOWNSEND, Respondent.

(GENERAL TERM, FIRST DISTRICT, APRIL, 1869.)

W. owned and mortgaged certain premises to T, by several mortgages, then conveyed by deed, intended as a mortgage, to C., and then in consideration of all the debts so charged upon the premises (that upon the conditional deed being paid by T.), conveyed the same to T., and at the same time obtained a conveyance thereof to him from C., whereupon T. gave C., for the benefit of W., an offer in writing to resell before a specified time, at a sum equal to the consideration of the conveyances to T., and mutual releases under seal were exchanged between T. and W. In an action by W. to redeem from T. after the expiration of the time named in the offer, it appearing that the conveyances to T. were intended to satisfy and extinguish the mortgage debts to him of W.—*Held*, that such conveyances were not merely mortgages, but absolute deeds.

This was an appeal taken from a judgment upon the decision of Mr. Justice CLERKE on a case and exceptions.

The plaintiffs brought their suit to obtain the reconveyance of certain lots in New York city, claiming the right to redeem

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the same from the defendant. The defendant denied the plaintiffs' right to redeem, and set up various releases and other matters in defence. The court rendered a decision in favor of the defendant, basing the same upon distinct findings of fact, forty-seven in number, from which the following facts, material to the decision on appeal, substantially appeared.

Some time in the spring or summer of 1856, D. W. Whitney, the plaintiff, contracted to purchase from one Kilpatrick certain lots on Park avenue, in New York city, for \$10,000, and to erect buildings thereon. Kilpatrick agreed to advance to him for that purpose the sum of \$7,000 as the work progressed, but failed to do so to the extent promised, having in August, 1856, advanced but \$1,600. Whitney then entered into an agreement with Townsend, the defendant, by which the latter undertook to loan the plaintiff money, upon the security of an assignment, which was made, of Whitney's contract with Kilpatrick. Kilpatrick held the property under a contract with one Kinsley, who was the legal owner of the fee, and on the 1st January, 1857, Kinsley executed five mortgages to the loan commissioners, upon different lots, in the aggregate for \$14,442, and after delivery of the mortgages, on the same day, by the defendant's procurement, conveyed the premises, to one Lovett, who paid no consideration, but took the conveyance, as representing the defendant. On the 16th January Lovett conveyed, at the request of the defendant and with assent of Whitney, to one McWilliams, who on the same day, by like request and with assent of Whitney, mortgaged to one Norton for \$8,781.98, the sum then due for advances from Whitney to the defendant, and Norton in August, 1858, assigned the mortgage to the defendant. McWilliams, after mortgaging to Norton, and on the same day, at Whitney's request, conveyed the premises to Whitney's wife, the plaintiff Jerusha, by deed, reciting the mortgage to Norton as part of the consideration, and after this conveyance Whitney and his wife executed and delivered various other mortgages to different persons, but

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for the defendant's benefit, and for money advanced by him, and to whom they were subsequently assigned. The plaintiffs also executed a conveyance, subsequently to the mortgage before mentioned, to one Coddington, in consideration of a loan of \$1,500, which was absolute in terms, but in fact intended as security for the sum loaned. After many negotiations and transactions between the parties, an arrangement, being a modification of one proposed theretofore by the counsel acting at that time for the plaintiffs, was carried out between the parties, on the 8th October, 1861, the defendant acting through Mr. A. R. Dyett as his counsel, substantially as follows, viz.:

Coddington conveyed the premises to the defendant, who gave to Coddington his check for \$1,500 in payment, to that extent of the amounts due him by the plaintiffs; the plaintiffs also conveyed the premises to the defendant, and full general releases were executed under seal, acknowledged and interchangeably delivered between the plaintiffs and the defendant, and certain suits which had arisen on both sides out of the transactions before recited, were substantially abandoned, and a letter signed by the defendant was delivered to Coddington at the same time, but by agreement between the plaintiffs and defendant, was dated on the day following, as follows, viz.:

*" Dear Sir—*I will sell to you the three houses and lots on Park avenue, Nos. 19, 21 and 23, lately purchased by me of Mrs. Jerusha Whitney at any time before the 1st day of February, 1863, in such condition as they may then be, for the following prices :

" The house and lot on the corner of Park avenue and Thirty-fifth street for \$12,166.

" The house and lot next to the corner for \$10,666.

" The house and lot next but one to the corner for \$10,666.

" To these prices, however, is to be added interest on the purchase money from this date, and all taxes and assessments hereafter to accrue, or to be imposed upon the premises up to the time of your purchase, deducting whatever amount I

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may receive up to that time for rent of the house sold over and above the insurance and repairs, and subject to any then existing leases that may have then been made by me of either of the houses.

“As you have every opportunity to examine the title, it must be understood, that the deed from me to you will contain no covenants whatever except the usual covenant against my own acts. This offer to remain open for your acceptance until the 31st day of January, 1863, but not a day afterward.

“I acknowledge the receipt of one dollar from you as a consideration for giving you this option to purchase the houses.

“Yours truly,

(Signed)

“R. W. TOWNSEND.”

The last three lines of this letter were added at the request of the plaintiff, D. W. Whitney, who insisted that the agreement or offer in the letter, on the part of Townsend, had no consideration, and at his (D. W. Whitney's) request, also, at the same time, a guarantee was indorsed on said letter, and signed by said A. R. Dyett, as follows:

“*Dear Sir*—In consideration of one dollar to me paid, I guarantee the performance by Mr. Townsend of the annexed agreement on his part, and I will forfeit \$500 if Mr. Townsend shall refuse to perform the same.

“Yours very truly,

(Signed)

“A. R. DYETT.

“MR. THOMAS B. CODDINGTON.

“NEW YORK, *Oct. 8th*, 1861.”

The plaintiffs and defendants also gave consent, respectively, that judgments should be entered in Townsend's favor, in certain suits, viz.: One brought by the latter to foreclose two of the mortgages held by him on the premises; and another by the former to obtain judgment, declaring certain of the mortgages executed by them void for usury. The defendant also surrendered a claim against the plaintiffs for

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his professional services in their behalf as a lawyer, and gave them a consent to discontinue without costs, a certain other action against them, also arising out of the same transactions.

The thirty-fourth finding of fact is substantially given above; the thirty-fifth to fortieth findings, both inclusive, referred to in the opinion, were as follows, viz. :

“35. The mortgages which defendant at this time owned, and had in his possession, executed by the plaintiffs, and the bonds executed by the plaintiffs, and accompanying said mortgages, as specified in the thirty-third finding herein, were not given up by defendant to plaintiffs, or either of them, on the 8th of October, 1861; nor were these bonds and mortgages, or any of them, canceled, nor did the defendant agree to cancel them, or any of them, nor was anything said by any one on the subject at the interview at defendant's office, specified in the thirty-fourth finding. Defendant retained these bonds and mortgages, and there is no evidence that he has since delivered them up, or any of them, or canceled them, or any of them, or offered to do so; but the release executed and delivered by the defendant to the plaintiffs on said 8th day of October, 1861, released and discharged the plaintiffs from the payment of the said bonds and mortgages.

“36. The law firm of Townsend, Dyett & Raymond (of which defendant was a member), did not, nor did defendant on behalf of that firm, sign or execute any receipt or other paper, discharging the plaintiffs, or either of them, from any alleged indebtedness to said law firm.

“37. At the interview at defendant's office, 8th October, 1861, stated in the thirty-fourth finding, it was probably supposed by defendant, by the plaintiffs, and by Coddington, that the letter to Coddington was ultimately for the benefit of the plaintiffs, or for the benefit of the plaintiff, Jernsha Whitney. The said Coddington, from said 8th day of October, 1861, until after the commencement of this action, held the said letter in his own possession, and refused to deliver the same to plaintiffs, claiming a right to hold the same for his own protection, and as security for the payment of the

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balance due him by the plaintiffs for money lent to them, and neither the plaintiffs, nor the said Coddington, either within the time specified in the said letter, or at any time before the commencement of this action, ever accepted the offer contained in the said letter, or notified the defendant of his or their intention to do so; nor did the said Coddington ever assign the said letter, or any offer or agreement therein contained, or any interest therein, to the plaintiffs, or either of them.

“38. At the said interview at defendant’s office, 8th October, 1861, defendant did not state to plaintiff, D. W. Whitney, that if the property in question should be sold before his (defendant’s) advances were paid, he would pay over to plaintiffs all he (defendant) received over and above his advances; but, on the contrary, both the defendant and his counsel, A. R. Dyett, Esq., refused to make, and did not make, any agreement of any kind with the plaintiffs, or either of them, for or upon the subject of the sale to them, or either of them, of the houses and lots in question, but insisted upon making, and did make, all the agreement that was made on that subject, and which was contained in the letter and offer before mentioned, addressed to Coddington, and dated October 9th, 1861; that the defendant carefully and resolutely declined to give the plaintiffs any right, legal, or equitable, against him requiring that he should reconvey the property to the plaintiffs, or either of them, or that he should be under any legal liability whatever to do so.

“39. At the said interview at defendant’s office, 8th October, 1861, neither the defendant, or Mr. Dyett on his behalf, stated to plaintiff, Mr. Whitney, that on the payment of his (defendant’s) advances, defendant would return the property to the plaintiff, Jerusha Whitney. But, on the contrary, it was understood by the plaintiffs and their counsel, and Mr. Coddington, as well as by the defendant, that unless the offer contained in the letter of the defendant to Coddington, of October 9th, 1861, before referred to, was accepted, and the purchase money paid on or before the day specified

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therein, the said Coddington would not have any right or privilege of purchasing the houses and lots in question after that time; but the title would continue absolute in the defendant, free from any obligation on his part to convey pursuant to said offer. And at the interview before referred to, of the 8th of October, 1861, at defendant's office, Albert Smith, one of the plaintiff's counsel, asked the plaintiff, Daniel W. Whitney, if the time fixed in the offer to make the purchase was long enough, and the said D. W. Whitney answered that the time was sufficient.

"40. At the said interview, on the 8th of October, 1861, specified in the thirty-fourth finding, both the defendant, and Mr. Dyett, on his behalf, stated to the plaintiffs and Mr. Coddington, that the latter would not be entitled to a conveyance of the property, on the payment of the purchase money mentioned in the letter or offer aforesaid, after the day specified therein."

The defendant having sold one of the lots, and the house which had been built thereon by the plaintiffs, for \$16,000, the plaintiffs caused a tender of the balance over and above the price received by the defendant upon the sale, of the latter's advances, and demanded a reconveyance to the plaintiff, Jerusha Whitney, of the lots and houses unsold, and upon refusal, brought this suit.

Henry L. Clinton, for the appellants.

Henry A. Cram, for the respondents.

Present—CLERKE, SUTHERLAND and INGRAHAM, JJ.

By the Court—SUTHERLAND, J. On the 8th of October, 1861, when the transaction specified in the thirty-fourth and seven following findings of fact took place, the defendant owned all the mortgages on the property in question (Nos. 19, 21 and 23 Park avenue), and the bonds accompanying the same, except the two to the loan commissioners.

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These mortgages are described in the sixth, eighth, eleventh, thirteenth, fourteenth and fifteenth findings of fact.

It follows from the findings which have been referred to, that at the time of the transaction of the 8th of October, specified in or by the thirty-fourth and following findings of fact, that the defendant was the owner and holder of eight mortgages on the premises and the accompanying bonds, the aggregate amount of the principal of which, without interest, was about \$23,500, and which mortgages were all subsequent to the two mortgages to the loan commissioners, amounting together to \$3,700 without interest.

By the seventeenth finding of fact, it is found, that the deed to Coddington, though absolute in form, was given and intended as a mortgage to secure the payment of \$1,500, advanced by Coddington to the plaintiffs, and was always so regarded by the plaintiffs, the defendant and Coddington.

By the forty-first finding of fact, it is found, that at the time of the delivery of the deed of the plaintiffs to the defendant, on the 8th of October, 1861, specified in the thirty-fourth finding, the title to the property in question, was in the plaintiff, Jerusha Whitney, subject to the mortgages specified in the eighth, eleventh, thirteenth, fourteenth and fifteenth findings and subject to the mortgage to Coddington (in form an absolute deed), specified in the seventeenth finding.

By the thirty-fourth finding, it is found as part of the transaction of the 8th of October, that Coddington delivered to the defendant a deed of the premises, executed by him (Coddington) and his wife, and that the plaintiffs delivered to the defendant a deed of the premises executed by them, and that the defendant gave his check to Coddington for \$1,500.

The words of the finding are, that "defendant delivered to Coddington, his (defendant's) check for \$1,500 in payment to that extent, of the amount due him by the plaintiffs"; but I think it entirely clear from the evidence, that Coddington at the time of the transaction of the 8th of October, did not claim or pretend to claim, that he held the deed of the premises as security for any amount or sum beyond the \$1,500,

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and that the whole transaction of the 8th of October, took place, and was carried out, with the understanding and upon the assumption of all the parties to it, that the only claim or lien Coddington had on the premises, was the \$1,500. Considered by itself, the absolute conveyance of Coddington and wife to the defendant, was in equity, but the assignment of a mortgage for \$1,500 ; but considered in connection with the absolute conveyance made at the same time by the plaintiffs, the two conveyances in form conveyed to the defendant the legal and equitable title in or to the premises, and the equity of redemption.

The letter of the defendant, addressed and given to Coddington on the 8th of October, specified in the thirty-fourth finding, must be deemed under undisputed circumstances to have been intended for the benefit of the plaintiffs or of Jerusha Whitney, one of the plaintiffs, and whatever right or privilege it gave or was intended to give, I assume that the plaintiffs can avail themselves of.

I have referred sufficiently to the findings of fact to state intelligently what I regard as the question in this case.

It is said that the question is, whether the transaction of the 8th of October, as specified in the thirty-fourth and subsequent findings, was a mortgage or an absolute sale ; but I think it better to say that the question is, did the transaction of the 8th of October, as found and specified in the thirty-fourth and subsequent findings, satisfy and extinguish the defendant's mortgage debts.

Were the absolute deeds of the plaintiffs and of Coddington and wife executed for the purpose or with the intention of satisfying and extinguishing these debts, as between the plaintiffs and the defendant, and were these absolute conveyances renewed by the defendant as a satisfaction and extinguishment of these debts ?

Unless the defendant's debts survived the transaction of the 8th of October, it is impossible to hold that it was a mortgage or amounted to a mortgage, or that the letter of the

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defendant addressed to Coddington was, or was intended to be, or to operate as, a defeasance.

We cannot give the plaintiffs, or either of them, a right to redeem, unless we hold that the defendant's mortgage debts have continued, notwithstanding the transaction of the 8th of October, and that the letter to Coddington was given and received as a defeasance, and not as an independent promise to re-sell or to re-convey.

I infer from the evidence and the findings, though upon this point the case is more obscure than any other, that the aggregate of the prices or sums mentioned in the letter to Coddington as the prices or sums to be paid with interest, etc., for re-conveyance of the several houses and lots, was made up by adding the \$1,500 paid to Coddington to the aggregate of the amounts due on all the mortgages on the premises, including not only the eight held and owned by the defendant, but also the two to the loan commissioners. This, however, does not precisely agree with the statement in the deed of the plaintiffs to Coddington, of the amount due on all the mortgages.

But assuming the aggregate of the prices mentioned in the letter to Coddington to be paid with interest, &c., for the re-conveyances to be the precise amount which the plaintiffs ought to pay with interest, &c., to redeem the three houses and lots, if allowed to redeem, yet it does not necessarily follow that the transaction of the 8th of October was or should be regarded as a mortgage, or that the title to Coddington was, or was intended to be, a defeasance.

A mortgagor can sell his equity of redemption to his mortgagee. He can convey it in satisfaction of his mortgage. If he does so, there is no rule of law or equity which prohibits the mortgagee from giving back to the mortgagor an agreement to resell or reconvey within a certain time for, or on payment of the mortgage debt and interest. If he does so, it does not necessarily follow as a conclusion of law, or from any maxim or principle of courts of equity, that the transaction is or amounts to a mortgage, and the agreement

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to reconvey a defeasance. The whole question is a question of intention.

A court of equity will scrutinize the transaction, because of the relation between the parties, and it will give the mortgagor the benefit of any reasonable doubt; but if from the circumstances of the transaction, including declarations as well as acts, the inference is clear, that the transaction was intended to be an absolute sale with a right to re-purchase, and not a mortgage, a court of equity will hold the parties to their intention.

A court of equity has no more right than a court of law to make contracts for parties.

If you start in this case with the assumption, that the letter to Coddington was a defeasance, and say, therefore, the transaction of the 8th of October, of which the letter forms a part, was a mortgage, or with the assumption that the transaction was a mortgage, and say, therefore, the latter was a defeasance, of course the right of redemption follows.

There is no such thing as an irredeemable mortgage. No such thing can be created. The principle that a court of equity could and would relieve from a forfeiture by the terms of the mortgage contract, would seem to have been established notwithstanding the opposition of the courts of law at an early day. (See *Langford v. Barnard*, Tothill, 134; *Emmanuel College v. Evans*, 1 Ch. Rep., 18.)

The recognition of this principle and its application in and to cases, established as a pure equitable right, what is called the "mortgagor's equity of redemption." This right courts of equity will not permit to be waived, defeated, impaired or fettered by any contrivance of the parties, or any agreement, covenant or act even of the mortgagors, at the time the mortgage is created, or forming part of a transaction by which the mortgage or the mortgage debt is recognized and continued as a mortgage debt.

To permit this to be done would be inconsistent with the establishment and application of the right or principle of redemption as a right or principle of pure equity.

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Hence, the maxim, "once a mortgage always a mortgage."

Of course, upon the assumption that the transaction of the 8th of October, was a mortgage, or a continuation of the defendant's mortgage debts, and the letter to Coddington a defeasance, all that was said or done at the time of the transaction, tending to show that the parties to it intended that the transaction should and would, as between the plaintiffs and the defendant, satisfy and extinguish the defendant's mortgage or mortgage debts, would be utterly immaterial; but it is clear, that for the purpose of determining this preliminary question, whether by the transaction the parties to it intended to extinguish or continue the mortgage debts as between the plaintiffs and the defendant, upon the determination of which depends the determination of the question, whether the transaction was or should be regarded as a mortgage or as a continuation of the mortgage debts and the letter to Coddington a defeasance, all that was done or said at the time by any or either of the parties to the transaction relating to its subject might be material. What was said by any or either of the parties at the time was admissible in evidence, not of course for the purpose of contradicting or varying the letter or the deeds, but for the purpose of showing their intended effect, that is, for the purpose of showing whether the transaction was intended to extinguish or to continue the defendant's mortgage debts.

The circumstances, that there was the relation of mortgagor and mortgagee between the parties, that the defendant is a lawyer, and that one of the plaintiffs and the one most interested in the question of the right of redemption, is a married woman, that the defendant had formerly been the lawyer of the other plaintiff, her husband, the nature of the pending litigations between the plaintiffs and the defendant at the time of the transaction, and other undisputed circumstances, have led me to examine this case, and the question of intention in it with special care, and would have inclined me, and probably have made it my duty to give the plaintiffs the benefit of any reasonable doubt; but I must say, as the

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result of such examination, that I cannot avoid the conclusion, that the transaction of the 8th of October was intended not only to settle the pending litigations and all matters in difference between the plaintiffs and the defendant, but was intended also to satisfy and extinguish the defendant's mortgages and mortgage debts, certainly as between the plaintiffs and the defendant.

Mr. Whitney's own evidence will not permit me to doubt, that at the close of the transaction, he, his counsel and Coddington, understood and supposed, that a reconveyance or reconveyances under the letter to Coddington, could not be compelled or rightfully claimed, without complying *with the terms of the letter*.

It may be that it was the defendant's main purpose by the transaction to get rid of the pending litigations and the question of usury; but if so, I cannot doubt that he intended to get rid of them by accepting the absolute conveyances in satisfaction of his mortgages and claims.

Looking only at such of the circumstances of the transaction of the 8th of October, specified in the thirty-fourth, thirty-fifth, thirty-sixth, thirty-seventh, thirty-eighth, thirty-ninth and fortieth findings, as are unquestioned by an exception, in the light thrown upon them by the relations of the parties, and the circumstances under which the transaction took place, as shown by the evidence and found by other unquestioned findings, it is difficult to avoid the inference that the transaction was intended, and at the time understood by all the parties to it not only to settle and put an end to the pending litigations and all matters in dispute between the plaintiffs and the defendant, but also to satisfy and extinguish the defendant's mortgages, mortgage debts, and claims of every kind.

The absoluteness of the deeds, the fullness of the mutual releases, the careful wording and just dating of the letter to Coddington, and the addressing and giving of it to him instead of the plaintiffs or either of them, with the purpose avowed at the time of preventing the transaction being called

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or having the appearance of a mortgage, the consent that judgments be entered in the defendant's favor in the two actions, the payment of the \$1,500 to Coddington, all tend forcibly to this inference.

The circumstance that the property was at the time worth little, if any, more than the mortgages on it, and the nature of the then pending litigations between the parties, makes it not unlikely that the plaintiffs thought it best to convey the property to the defendant in satisfaction of his mortgages and claims upon receiving back the letter to Coddington, as giving them a right to repurchase and to a reconveyance or to reconveyances upon the terms specified in it.

The very circumstance that the defendant's claims were upon mortgage tends to the same inference, for why should he wish by the transaction to create a new mortgage, or why should he go through with all the formalities of the transaction for the mere purpose of extending the time of payment of his mortgage debts?

It is not singular nor inconsistent with this inference that the defendant should retain his mortgages as muniments of title, especially considering that the defendant himself had attacked the conveyance to the plaintiff, Jerusha Whitney, and under which she claimed title, as fraudulent and void, as to the creditors of her husband.

The circumstance that the deed from the plaintiffs to the defendant was drawn, conveying the property subject to all the mortgages, is consistent with an intention on the part of the defendant to retain his mortgages as muniments of title.

If the property, instead of greatly appreciating in value, had depreciated, and the defendant, after the time fixed by the letter to Coddington, upon the theory that the transaction of the 8th of October, had left the equity of redemption in the plaintiffs or in Jerusha Whitney and continued his mortgage debts, had undertaken to foreclose the equity of redemption and obtain a decree for any deficiency, could not the transaction of the 8th of October have been set up as a bar to the proceeding? I think it could. If so, I do not see

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how the plaintiffs or Jerusha Whitney can have the right to redeem.

Jerusha Whitney probably was not personally present at the transaction, but her husband was, and acted for himself and her, and must be presumed to have been authorized so to act, and he had counsel with him. There can be no doubt that she is bound by the transaction and its judicial interpretation.

The view which has been taken of the case makes it unnecessary to pass upon the numerous exceptions to the findings and omissions to find. In the view which has been taken of the case, it is immaterial whether they or any of them were well taken or not. The right of the plaintiffs or of Jerusha Whitney to redeem it, if it exists, must rest on the conceded circumstances of the transaction of the 8th of October.

The evidence of the previous negotiations between Mr. Nash and Mr. Dyett probably was not admissible as against the plaintiffs, but I cannot see in any view of the case that the evidence could injure the plaintiffs; and in the view of the case which has been taken, the evidence is entirely immaterial.

The evidence of usury was properly excluded. The question of usury, in fact, was not made by the pleadings, and the whole transaction of the 8th of October was upon the theory that the plaintiffs by it abandoned and intended to abandon the charge or question of usury.

The judgment should be affirmed, but I am inclined to think, considering the circumstances of the case, that the judgment should be affirmed without costs to any party as against another party.

CLERKE, P. J. I concur in the conclusion at which Judge SUTHERLAND has arrived, except as to costs. It was a very clear case, in my opinion. The defendant plainly never would have been troubled with this long and cumbrous litigation if the property had depreciated instead of having risen in value. I am in favor of affirmance with costs.

Judgment affirmed.

MARY C. NORTH, Appellant, v. HUTCHINSON CASE, Executor,
&c., Respondent.

(GENERAL TERM, SECOND DISTRICT, SEPTEMBER, 1869.)

The defendant's testator, while living, delivered to the plaintiff, his sister, a sealed envelope, indorsed with directions not to open it until after his death, and to return it to him on request; this was upon his recovery from a dangerous illness, happening upon a visit at the plaintiff's house, during which he had received from her extreme care and attention, and frequently told her that he would pay her well; the envelope was once returned to the testator at his request upon a subsequent visit, and redelivered to the plaintiff some two hours afterward. After the testator's decease, the plaintiff being previously ignorant of its contents, the envelope was found to contain his note to her, for \$10,000, expressing the consideration to be for services rendered to him.—*Held*, that the plaintiff was entitled to recover the whole amount of the note.

THE testator, who lived in Suffolk county, several years before his death visited his sister, the plaintiff, who resided in the western part of the State. While there he was taken with a sudden and dangerous illness. The plaintiff took extreme care of him and nursed him. The testator after a short illness recovered. During his sickness, and speaking in reference to the plaintiff's fidelity to him, he repeatedly told plaintiff that he would pay her well. After his convalescence, and before he returned home, the deceased delivered to plaintiff a sealed envelope, with a direction indorsed upon it, that it was not to be opened until after his death, and was to be returned to him on request. Plaintiff was ignorant of the contents of the envelope. Upon a subsequent visit to plaintiff, the deceased asked for the envelope. It was delivered to him by plaintiff. After an interval of two hours, he returned the envelope to plaintiff. After testator's death the plaintiff opened the envelope, and found contained therein, his note for \$10,000, expressing the consideration to be for services rendered by plaintiff to him.

The plaintiff brought her action upon the note in this court, and the same was referred to Hon. S. B. Strong.

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The referee made his report in favor of the plaintiff, for \$1,000.

The plaintiff appealed to this court.

Mr. Spencer and J. Lawrence Smith, for the appellant.

William Wickham, for the respondent.

Present—JOSEPH F. BARNARD, GILBERT and TAPPEN, JJ.

By the Court—BARNARD, P. J. It is very clear that if the deceased testator had made this note in consideration of the services rendered him, and delivered the same to plaintiff, and the same had been accepted by her in his lifetime, in payment for such services, the consideration would have been ample, and not open to question by deceased.

No one but testator could, in a case like this, where the services were of such a peculiar character, estimate their value to him, by a money standard. Such value would, when established by him and accepted by the person rendering the services, and in the absence of fraud, have been final.

So far as the testator was concerned, he in his lifetime fixed such value, evidenced it by a note expressing its consideration to be for services rendered him, and placed it in the plaintiff's actual possession; but the envelope in which it was inclosed was sealed, and on the envelope was indorsed a direction that it was not to be unsealed in testator's life, and was to be returned to him on his request.

From a careful examination of the cases I arrive at these conclusions :

That the delivery of the envelope was a delivery of the contents of it to the plaintiff, even though she was ignorant of such contents. That the testator never having required the redelivering of the envelope, the plaintiff's right to claim the whole note became absolute upon the acceptance by her of the note in consideration of such services as she had rendered. That such acceptance could be made by plaintiff after

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testator's death. That by the acceptance of the note by plaintiff after testator's death, the consideration expressed in the note as the value of the services she had rendered deceased became established the same as if personally agreed upon by the parties in testator's lifetime.

The plaintiff is therefore entitled to recover the whole note and the judgment of the referee should be reversed, costs to abide the event.

Judgment reversed.

JOHN M. SMITH and others, Appellants, v. MOTT D. SMITH
and others, Respondents.

(GENERAL TERM, SECOND DISTRICT, FEBRUARY, 1870.)

A will was executed in the presence of the draftsman, a person accustomed to drawing such instruments, and of two witnesses, in the following manner: The testatrix signed the instrument in the presence of the witnesses, and in response to a question put by the draftsman, acknowledged it to be her last will; the draftsman then said to one of the witnesses, "now Mr. W.," and, handing him the pen, the latter signed the attestation clause, which was full, and handed the pen to the other witness who also signed in like manner. The will was in possession of the testatrix at the time of her death.—*Held*, that it was duly published and executed.

APPEAL from a decree of the surrogate of Queens county, refusing probate of the will of Mary Smith, late of Flushing, in that county, deceased. The facts are stated in the opinion of the court.

J. J. Armstrong & Ralph E. Prime, for the appellants.

Benjamin W. Downing, for the respondents.

Present—JOSEPH F. BARNARD, GILBERT, TAPPEN and PRATT, JJ.

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By the Court—BARNARD, P. J. I think the evidence fully proves that the attesting witnesses, at testatrix's request, subscribed their names to the will in question. The will was drawn by Samuel Willetts, a justice of the peace who was accustomed to draw wills. The testatrix, the two witnesses, and Willetts were present at its execution. The testatrix in the presence of the witnesses and of Willetts, signed her name to the will. She then, in reply to a question put to her by Willetts, acknowledged the instrument to be her last will. This acknowledgment was in the presence of the witnesses. The draftsman of the will then said to one of the witnesses, "now Mr. White," and handed him the pen in the presence of all. White signed as a witness and handed the pen to the other witness; he signed also in the presence of all. The attestation clause is full. The will was found in the possession of testatrix at the time of her death. All the parties present knew what the paper was. It was duly published. The witnesses signed knowing what paper they were attesting. Mrs. Smith was present when they signed, and made no objection. Willetts, whom she had employed to draw the will, requested the witnesses to sign; and the request being made in her presence it is, in law, her request.

The decree of the surrogate should be reversed, and the question tried by a jury or a circuit court to be held in the county of Queens.

Decree reversed.

EDWARD MEHL, Respondent, v. WILLIAM VON DER WULBEKE,
Appellant.

(GENERAL TERM, SECOND DISTRICT, DECEMBER, 1869.)

An agreement of December 28, 1868, to sell real estate for a certain sum, and to take in payment therefor, in part a lease of restaurant premises, and in part merchantable wines at the market price, to be delivered at intervals from such time as the vendor should commence the restaurant business,

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and for one year thereafter, as they should be required, not to exceed in value \$250 at any one time; and, "on receiving such payments at the time and in the manner above mentioned," to deliver a deed, "which deed shall be delivered on the 31st day of December, 1868."—*Held*, not to be specifically enforceable in equity, as uncertain and impossible of execution.

APPEAL from a judgment, rendered after trial by the court at Special Term, upon a case with exceptions.

The action was brought to enforce specific performance of a contract bearing date the 28th December, 1868, for the sale by the defendant to the plaintiff of a farm and stock thereon in the county of Rockland, the material parts of the contract are set forth in the opinion of the court.

Judgment was rendered for the plaintiff for specific performance, and the defendant appealed.

Francis Byrne, for the appellant.

Jacob A. Gross, for the respondent.

Present—JOSEPH F. BARNARD, GILBERT and TAPPEN, JJ.

By the Court—BARNARD, P. J. By the agreement between the parties for the specific performance of which this action is brought, the price of the defendant's farm was to be \$8,000, the price by the agreement was to be paid by the plaintiff, as follows: \$2,000 by assuming a mortgage on the property, \$3,750 by transfer of restaurant 661 Broadway, \$250 for cows removed by defendant from farm, "\$2,000 (two thousand dollars) by delivering to the party of the first part (defendant), good marketable wines and liquors at the regular market price, at intervals commencing at the time the party of the first part (defendant) shall open such restaurant business and for one year thereafter, or they shall be required" by plaintiff, not exceeding \$250 at one time. The defendant covenanted that he, "on receiving such payment at the time and in the manner above mentioned," shall deliver a deed of

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the premises, "which deed shall be delivered on the 31st day of December, 1868."

It will be seen that by the agreement the defendant was only to deliver his deed upon being paid in full according to the contract, but the agreement calls for such delivery on the 31st December, 1868. No part of this \$2,000 in merchantable liquors could be demanded until that day or about that day, and the whole year of 1869 might be consumed in making that payment.

Did the parties mean that the deed should be delivered before payment?

The agreement says that such delivery shall be after payment, but also fixes a day so early that payment was impossible before the delivery.

In such a case what will equity do?

Shall the defendant be compelled to pass his title out of his hands before he receives the consideration in full, as he has provided by his contract, because of the day which is fixed for the transfer. This seems to me to be inequitable. The parties do not present such a case as is enforceable in equity. The contract is not only uncertain, but at the time was impossible of execution. The rights of the parties are such that the remedy at law is adequate.

The judgment should be reversed and the complaint dismissed without costs.

Judgment reversed.

ISRAEL J. ROGERS v. THE LONG ISLAND RAILROAD COMPANY.

(GENERAL TERM, SECOND DISTRICT, SEPTEMBER, 1869.)

The owner of a trunk sent it to the defendant's railroad depot by an expressman, who placed it within the depot, beside the baggage crate, which was locked, and upon inquiring of persons there, engaged in handling freight, was referred to the ticket agent as the person who took charge of baggage; he went to the ticket agent's office and told him that

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there was a trunk outside, the agent said that it was right, and immediately sent two men to take care of it. When the owner inquired for the trunk on purchasing his ticket later in the day, it could not be found though the ticket agent said he had seen one a short time before, answering to its description. Employes of the defendant also said that it had been delivered upon presentation of a check. In an action to recover the value of the trunk and its contents.—*Held*, that there was sufficient evidence of delivery, and a nonsuit was wrong.

Grosvenor v. The N. Y. Central R. R. Co. (39 N. Y. 34), distinguished.

APPEAL from a judgment of nonsuit upon a case and exceptions.

The action was brought to recover the value of a trunk and its contents, which the plaintiff claimed to have given into the charge of the defendant, previously to taking passage on its road. The facts are stated in the opinion of the court.

Ira H. Tuthill, for the appellant.

S. B. Noble, for the respondent.

Present—JOSEPH F. BARNARD, GILBERT and TAPPEN, JJ.

By the Court—BARNARD, P. J. There is no doubt but that to render a common carrier liable for goods to be carried by him, there must be a delivery to such carrier, and an acceptance upon the part of the carrier of the goods to be carried. The proof shows in this case that the expressman took the trunk in question to the depot of the defendant at Peck Slip, about noon of the 11th April, 1868. It was marked "Israel Rogers, Riverhead, Long Island." He found inside of the depot gate where he carried the trunk two or three men unloading freight of whom he inquired who took care of baggage. They told him the man in the office. He went to see the man in the office, and told him there was a trunk outside, he replied all right, and immediately sent two men to take care of it. The trunk was left by the expressman in the place where the baggage was kept and was inside

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of the defendant's inclosure and near their baggage crate, which was at the time locked. The man in the office had been defendant's ticket agent for some years. At about three o'clock on the same day, the plaintiff went to the ticket office and bought his ticket for Riverhead, and asked this agent for his trunk. He said he had seen a trunk answering the description a short time before, but did not know where it then was. The employes of the company subsequently informed plaintiff that the trunk had been given to an expressman who had a check corresponding to the one on the trunk.

The case should have gone to the jury. It is enough to establish a delivery in the first instance to prove that a person acting as the agent of the company received and accepted the property for transportation, even if there be in fact another person who is proved to be the actual agent having charge of the receipt of freight. There is no such proof in this case. The ticket agent was apparently in charge of the depot. The company which sanctions his employment and thus holds him out to the world as its agent, is not at liberty to repudiate his acts.

It seems also that the trunk, in point of fact, came to defendant's possession. The agent had seen it. The defendant had delivered it to a stranger who presented a check. Who checked it? When and where was it checked? It was left unchecked and marked plainly for Riverhead. Why was it redelivered to a stranger at Peck Slip on the day of its receipt?

The case of *Grosvenor v. The N. Y. Central R. R. Co.* (39 N. Y., 34), does not control this case. The court hold in that case that the delivery must be in a proper place. That a delivery of a cutter so near the track as to be caught by a passing train, was not a good delivery. No such question is presented by the facts of this case.

The judgment should be reserved and a new trial granted, costs to abide the event.

GILBERT, J., dissented.

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MARY TERRY and others, Appellants, v. JOHN W. WIGGIN
and another, Respondents.

(GENERAL TERM, SECOND DISTRICT, SEPTEMBER, 1869.)

Where the testator, by his will, devised a certain lot of ground to his widow, "for her sole and absolute disposal," and immediately after gave her all other real and personal estate of which he should die possessed, "for her own personal and independent use and maintenance, with full power to sell or otherwise dispose of the same, in part or in the whole if she should require it or deem it expedient so to do," and then authorized his executors to pay the residue of his real and personal estate to the trustees of a certain society,—*Held*, that the widow took an estate for life in the real estate secondly devised, with a general power of disposition, and that upon her decease without executing the power, said real estate passed to the second devisee.

And it seems that this is so at common law as well as under the Revised Statutes.

APPEAL from a judgment entered on a decision, after trial, by the court, in an action of ejectment, for premises in Southold, Suffolk county.

The plaintiffs claimed title, as heirs-at-law of Hannah Youngs, as devisee under the will of her husband, Joshua P. Youngs, deceased. The defendants claimed under the same will as the executors thereof. The will was given in evidence upon the trial, and was as follows, viz. :

"I, Joshua Preston Youngs, of Greenport, in the township of Southold and State of New York, being, by the mercy and good providence of Almighty God, in sound and disposing mind and memory, do hereby make and declare this to be my last will and testament, and revoking all other wills at any other former period made by me. And, first, I do hereby give and devise unto my beloved wife, Hannah Youngs, all my Northside lot and the woodland between that and the home lot, together with a lot, eight rods wide, adjoining Dr. Lord's land from the woods to the road.

"The said lots I give for her sole and absolute use and disposal. Also I hereby bequeath to my said wife, Hannah

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Youngs, all other real and personal estate and effects that I may die possessed of, for her own personal and independent use and maintenance, with full power to sell or otherwise dispose of the same in part or the whole if she should require it or deem it expedient so to do, save and except the sum of five hundred dollars which I shall entrust to her to appropriate according to verbal instructions from me. And on her decease I hereby authorize my executors, hereafter named, to invest whatever residue there may be of personal or real estate and effects in the hands of the trustees of the Congregational Society of Greenport aforesaid, to be by them placed out on good legal security, and the interest to be by them appropriated for the support of preaching the Gospel in the Congregational Church of Greenport aforesaid, so long and provided always that the doctrines there preached are in accordance with the Confession of Faith agreed upon by the Assembly of Divines at Westminster, England, and which were approved by the General Assembly, Anno Domini 1647, and ratified in 1649 and 1690; and I hereby appoint Dr. Frederick W. Lord, of Greenport aforesaid, and J. Wickham Case, of the town of Southold, my executors for carrying out the provisions of the last clause of my will, but do hereby constitute and appoint my dear wife sole executrix during the term of her natural life.

“As witness my hand, this twenty-third day of June, in the year of our Lord one thousand eight hundred and fifty-seven.

“JOSHUA PRESTON YOUNGS.”

The testator died in 1862; his wife died in 1868, without having sold any of the testator's real estate, except the lot particularly described in the first devise. The premises in question were included in the second devise.

William Wickham, for the appellants.

J. Lawrence Smith, for the respondents.

Present—JOSEPH F. BARNARD, GILBERT and TAPPEN, JJ.

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By the Court—GILBERT, J. This was an action to recover the possession of certain real estate devised by the will of Joshua Preston Youngs, to his widow, Hannah Youngs. The plaintiffs claimed as heirs-at-law of said Hannah. The sole question in the case is, whether this devisee took an estate in fee, or only a life estate in the *locus in quo*. In the first clause the testator gives to his said wife all of two lots of land particularly designated, and declares that "the said lots I give for her sole and absolute use and disposal." By the second clause he gives to his said wife, "*all* other real and personal estate and effects, that I may die possessed of, for her own personal and independent use and maintenance, with full power to sell or otherwise dispose of the same *in part* or the whole, *if she should require it* or deem it expedient so to do." This part of the second clause is followed by a direction that, on her decease, "I hereby authorize my executors hereafter named to invest whatever residue there may be of personal or real estate, or effects in the hands of the Congregational Society of Greenport, to be by them placed out on good legal security, and the interest to be by them appropriated for the support of preaching the Gospel." He then appointed two executors "for carrying out the provisions of the second clause" of his will, and appointed his wife sole executrix during her natural life.

It is contended on behalf of the plaintiffs, that the gift over is void for the reason, that it is repugnant to the preceding devise of the same lands to the wife. There is a class of cases, where a limitation over after a preceding estate has been held inoperative and void by reason of the first estate being constructively a fee. The question in such cases grows out of the character of the first estate, that is whether it is determinable or not. If the first taker has the *absolute* right and power to dispose of the estate; that is, the right and power to sell and convey it in his lifetime, and to devise it by will, it is construed to be an unqualified gift to him, and the devise over will be void. (*Atty.-Gen. v. Hul. Fitzg.*, 314; *Jackson v. Bull*, 10 J. R., 19; *Same v. Robbins*,

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15 J. R., 169; *Same v. Delancey*, 13 J. R., 537; *Ide v. Ide*, 5 Mass., 500; *Ramsdell v. Ramsdell*, 21 Me., 288.) But it has also been held that if the power of disposal in the first taker is merely a technical power of appointment and not a right to dispose of the estate as his own property, a limitation over is good as an executory devise, though if such power were executed it would leave nothing to pass by the devise over. (*Truclinson v. Dighton*, 1 P. Wms., 171; *Sewell v. Birdseye*, 17 Pick., 339; *Rubey v. Burnett*, 12 Mo., 1; *Reid v. Arngold*, 10 Ves., 370.) And when upon a proper construction of the will it appears that it was the intention of the testator to qualify and restrain the first gift, the limitation over is good as an executory devise. (*Porter v. Bradley*, 37 R., 143; *Upswall v. Hall*, 1 P. Wms., 651; *Smith v. Bell*, 6 Pet., 68; *Norris v. Beyea*, 3 Ker., 273; *Trustees v. Kellogg*, 16 N. Y. R., 93.) The circumstance that the first taker had it in his power to dispose of the whole estate, and thus to defeat the limitation over, was never of itself conclusive when a contrary intention appeared from the will; but now it is expressly provided by statute (1 R. S., 725, § 33) that an expectant estate shall not be adjudged void, because it may be defeated in that way. The intention of the testator must, in all cases, be carried out if such intention can be ascertained from the will, and in no case can the intention thus ascertained be defeated upon any technical construction of the language employed. We think the testator, in this case, did not intend to give his widow such an absolute power of disposition as brings the case within the rule which avoids limitations over for repugnancy. This will appear pretty clearly by comparing the two devises. The first is a gift of a lot "for her absolute use and disposal." The second is a gift "for her own personal use and maintenance, with power to sell if she should require it;" that is, to pay for her maintenance, "or deem it expedient;" that is to say, for the proper management of the estate. This is not inconsistent with a devise to her for life, and no repugnancy arises except upon a construction of the will, which makes this devise a fee by

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force of the language employed, and without inquiry as to the intention of the testator. (*Doe v. Glover*, 1 M. G. & S., 447.) In this case the devise was "unto my son Mordecai Glover and his heirs and assigns forever; but in case my said son shall happen to depart this life without leaving any issue of his body lawfully begotten, then living or being no such issue, and he my said son *shall not have disposed and parted* with his interest in the property, &c., devised, I give and devise the same unto and to the use of my illegitimate daughter Ann Stevenson, of, &c., and of her heirs and assigns forever."

Mordecai Glover, the son, devised the estate to his wife, who was the defendant in the action. Ann Stevenson, the second devisee died intestate, and her son and heir-at-law was the lessor of the plaintiff. The court held unanimously that the gift over, was good as an executory devise, that there was nothing in it that was repugnant to or inconsistent with the prior devise; that the son might have prevented the devise over from taking effect by disposing of the property in his lifetime, but that in the event of his not exercising that power, the estate was given over, and nothing remained for him to part with by his will. The case is put upon the intention of the testator. To the same effect are the cases before cited, from 1 P. Wms., 6 Peters, and N. Y. R.

Such also is the rule established by the statutes of this State, when the first devisee takes an estate for life only, although such devisee is at the same time vested with a general and beneficial power to sell the lands devised. For the statute relative to powers has qualified the effect formerly given to power of disposition in cases like this case, by making the estate thus created absolute only in respect to the rights of creditors and purchasers, and subject to the limitation over, in case the power should not be executed or the lands should not be sold for the satisfaction of debts. (1 R. S., 732, §§ 81, 82, 83, 84, 85.) If, therefore, the devise in the second clause to the wife had contained the words, "during her life," there can be no doubt that by force of this

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statute the limitation over would be valid. The same result will follow, if the whole will manifests an intention on the part of the testator to pass an estate or interest less than the words import. For the statute which has destroyed the old rule, making words of limitation or restriction requisite to the creation of a fee by devise, is by its terms rendered inoperative, when the intent to pass a less estate or interest shall appear by express terms, or be necessarily implied in the terms of the devise. (1 R. S., 748, § 1.)

The sole question, therefore, upon the whole case is, whether it was the intention of the testator to give his widow an estate for life, with a general power of disposition to be exercised in her lifetime, and in case the power should not be exercised to give the estate or that part of it which should remain undisposed of to the second devisee named.

We are of opinion, that such was the intention of the testator, and that the limitation over is good as an executory devise, both at common law and by virtue of our own statute; that such was clearly the intention of the testator, and that it can be defeated only by expunging the last part of the second clause of the will. We are not at liberty to do this upon the mere ground of a repugnancy, arising out of the intention of the testator to permit his wife to use and dispose of the estate for her maintenance, for upon the principle laid down in the cases last referred to, and which is also declared in the eighty-seventh section of the Statute of Powers before cited, effect can be given to this intention and the secondary gift be preserved.

For these reasons the judgment appealed from must be affirmed with costs.

Judgment affirmed.

Weir v. Hill.

CLARK WEIR, Respondent, v. JOHN W. HILL, Appellant.

(GENERAL TERM, EIGHTH DISTRICT, FEBRUARY, 1870.)

Performance by one party of his part of an unwritten contract, which by its terms, is not to be performed by the other party within one year, will not take the case out of the statute of frauds, so as to sustain an action at law against the latter for damages for non-performance.

H. received a dollar, under agreement to invest it in sheep, and double them every four years, until W. came of age, and then to deliver them to him, and made the investment accordingly.—*Held*, that W. at majority could only recover the money received by H. to invest for his benefit, with interest.

THIS action was commenced in a justice's court in Allegany county, on the 30th of May, 1867. Upon the trial before the justice the defendant had judgment for costs. The plaintiff thereupon appealed to the County Court, where the action was again tried, and a verdict recovered by the plaintiff for ninety-six dollars. A motion was made for a new trial by the defendant, and denied, and judgment was recovered on the verdict by plaintiff. The defendant thereupon appealed from both the order and judgment to this court.

E. E. Harding, for the appellant.

E. D. Loveridge, for the respondent.

Present—MARVIN, BARKER and DANIELS, JJ.

By the Court—DANIELS, J. This was a strict action at law, brought for the recovery of damages for the non-performance of a contract made by the defendant for the benefit of the plaintiff, and he must recover, if he can recover at all, according to the legal, as distinguished from the equitable principles of the law. The contract which it was alleged the defendant had made, and failed to perform, was not in writing. Neither was any note or memorandum of it put in

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writing and subscribed by the defendant who was to be charged by its terms. As the plaintiff stated it in his complaint, and the evidence tended to establish it upon the trial, it was an agreement by which the defendant undertook to receive a dollar, left by her mother with his wife during the infancy of the plaintiff, and invest the same in sheep, to be doubled every four years during the period of his minority, and at the expiration of that time, to return the sheep to the plaintiff. This contract was plainly within the statute of frauds, because it could not be performed within one year from the time when it was made, and so long as it remained executory, it was altogether inoperative and void for that reason.

The evidence given on the part of the plaintiff tended to show that the defendant did receive and invest the dollar in sheep for the plaintiff, and undertook to double them every four years while the plaintiff continued a minor. But it was not satisfactorily shown on the part of the plaintiff that he did double the sheep every four years or in any four during the plaintiff's minority. And that was one important fact to be proved by the plaintiff before he could entitle himself to a recovery in the action. For being a void contract, his right to maintain an action for the recovery of the fruits of it depended entirely upon his ability to prove that it had been executed by the defendant, and in that manner excluded from the operation of the statute of frauds.

Upon this part of the case the plaintiff's evidence tended to show that the defendant bought sheep of Metcalf fifteen or twenty years before the trial in the County Court, which was had on the 18th of August, 1868, for the Weir children and his own, and let them out to him at the time he bought them. But whether they increased or not while left in his hands was not stated. About twenty years before the trial he desired the husband of Clotilda Weir to take the children's sheep and take care of them, but he declined to do that. It appeared that a controversy arose with the defendant concerning the sheep claimed by Frank Weir, a brother of the plaintiff, and during

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its adjustment the defendant stated that he always intended to pay the children a pound of wool a head ; that he had bought the sheep ; had let them out ; and they had caused him a great deal of trouble, and he had always supposed he could compromise with them (the children) at the age of twenty-one years. The defendant also stated that Frank picked out the best of the sheep. When the summons was served, the officer testified that the defendant told him that Mrs. Phillips had been in the habit of leaving money with them to buy sheep for the children ; that plaintiff wanted thirty-two sheep ; that sheep were very high at that time, and he thought that Clark ought to take up with his dollar and a pound of wool a head. The defendant said he didn't think himself under any obligation, but would fix it up as he had with the others. The other evidence relating to this part of the case consisted of positive denials on the part of the defendant that he had any sheep of the plaintiff's, or was under any obligation to him. In the evidence referred to, which was all that was given from which it can be pretended that the sheep had been doubled by the defendant, there is none that in any manner tended to establish that fact beyond the circumstance that he had let the sheep out after he bought them and the statement made by the officer who served the summons, and both together were not sufficient to prove that as a fact. He did not admit in what was said by the defendant to the officer, that the plaintiff's claim of thirty-two head of sheep was valid. Neither did he say on how many head of sheep he thought the plaintiff ought to take up with a pound of wool on each. If he had, there might be some slight color for presuming that the sheep originally purchased had, by doubling increased to that number. But he not only refrained from making such a statement, but beyond that positively denied that he was under any obligation even to do by the plaintiff by way of settlement the same as he had previously done by the other children.

This evidence was altogether too loose and unsatisfactory, to justify the jury in concluding from it, as they must have

done to arrive at the verdict they rendered, that the sheep had been doubled every four years during the plaintiff's minority. It neither naturally, nor logically warranted any such inference. That might have been the fact, but under no rational system of reasoning could it be deduced from the evidence given in the case. And when that is the quality and character of the evidence given, there is no system of legal presumption under which it can be made to justify the conclusion that was evidently drawn from it in this case by the jury. (*O'Gara v. Eisenlohr*, 38 N. Y., 296.)

But even if the evidence had been such as to have satisfactorily shown that the defendant had so far performed the void agreement made by him, as to have doubled the sheep during the minority of the plaintiff, the statute would still stand in the way of his recovery. For the stipulation or agreement to return them to the plaintiff, would even then remain executory. And while that proved to be the fact, the courts would have no more right to pronounce that to be valid than they would to hold the entire contract binding without performance in plain conflict with the express terms of the statute. A part performance of a contract, void by the statute of frauds, may render it binding and valid, as far as that extends. But it can have no effect upon the remaining stipulations still continuing executory. As to those, the statute remains operative, declaring them to be void. The sole object of the plaintiff's action, was the recovery of damages for the non-performance of the executory portion of the agreement made. That, he was bound to establish for the purpose of sustaining the legal theory of his case. And when he did so, the statute interposed against him, by declaring the stipulation he relied upon void, by reason of the circumstance, that it still remained executory. If the power exists to maintain an action for the non-performance of one portion of a contract, void by the statute of frauds, it is difficult to see what can stand in the way of allowing the same thing to be done where an entire omission to perform may be shown by the evidence. And that would be no less than a repeal

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of the statute itself. If the statute can be disregarded as to any one part of the contract remaining executory, the same reason will justify the courts in doing the same thing by it as to the others, and as to all of them together. It can hardly require authority to show the impropriety of such an administration of the law. In this respect this case is very much like that of *Bartlett v. Wheeler* (44 Barb., 162), where it was held that an action could not be maintained for the recovery of damages for the non-performance of a portion of an entire contract void by the statute of frauds, even if other and material portions of the agreement had been fully executed. *Lockwood v. Barnes* (3 Hill, 128); and *Broadwell v. Getman* (2 Denio, 87), also in principle maintain that conclusion. The case of *Dodge v. Crandall* (30 N. Y., 294), contains nothing in conflict with this theory. For there the verbal agreement made for the extension of the time for the payment of the mortgage debt was fully executed; and that the court held actually created the extension as a matter of fact. It was no longer a contract to extend the time of payment, but an agreement that through its performance had produced the extension stipulated for. The entire theory of the plaintiff's case shows that no such result had been produced by the partial performance of the agreement in controversy in this cause. The court should have held and charged as it was requested to, that the contract in suit was void under the statute of frauds, and that would have reduced the plaintiff's right of recovery to the money received by the defendant to invest for his benefit, and interest upon it to the time of the trial. The judgment and order should be reversed and a new trial ordered, with costs to abide the event.

BARKER and MARVIN, JJ., concurred
Judgment reversed.

Goss v. Mather.

JOHN GOSS, Appellant, v. HORATIO N. MATHER, Respondent.

(GENERAL TERM, EIGHTH DISTRICT, APRIL, 1870.)

Judgment against M. as maker, G. as first and T. as second indorser of a promissory note, was enforced by execution sale of G.'s land, at which T. was the purchaser for the amount due upon the judgment, he having become the assignee thereof, and expenses. T. agreed to give G. three years to redeem, and, persuading M. that nothing had been realized toward satisfying the judgment, agreed with him to satisfy it on receiving certain payments, in the aggregate considerably less than the amount due thereon, and also assigned his certificate of sale to G. on payment by the latter of a sum in full of, and nearly equal to, the amount of his bid. T. satisfied the judgment as against all of the defendants therein on payment by M. as agreed, and when G. learned of the transaction he sued T. and recovered judgment for the amount paid on assignment of the certificate; but T. being deceased, his estate paid only part of the judgment.—*Held*, that G. had an election upon discovery of the satisfaction given to M. either to ratify it and claim to recover from T. the amount which he had paid to the latter, or to ratify the execution sale, and recover from M. as principal debtor upon the theory that he (G.) had paid the judgment; but that having elected to pursue the former remedy, he could not recover afterward from M. the balance of his judgment against T.

THE defendant, on the 18th of March, 1861, made and delivered his promissory note to the plaintiff for the payment of the sum of \$335 to him or order. The plaintiff indorsed and transferred the note to Charles H. Thing, and he indorsed and transferred it to James A. Story. When the note became due, Thing and the plaintiff were properly charged as indorsers; and Story thereupon brought an action upon the note against the defendant as maker and Thing and the plaintiff as indorsers, and recovered judgment against them for the amount due upon the note. On the 17th day of May, 1862, the sheriff of Cattaraugus county, under an execution issued upon the judgment, sold a piece of land belonging to the plaintiff for the sum of \$410, which was sufficient to satisfy the judgment, together with the interest and the expenses, and the execution was immediately thereafter returned satisfied. The land sold was bid in by Bela Norton,

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who prior to the sale had become the assignee of the judgment for the benefit of Thing, and by virtue of an arrangement between him and Norton, and under the arrangement Norton purchased the land sold under the execution and held, it for the benefit of Thing. Norton had in fact no interest in the judgment or the sheriff's certificate made and delivered in pursuance of the sale. After the sale an arrangement was made between the plaintiff and Thing, that the former should have three years to redeem his land from the sale, and subsequent to that time under another arrangement made between the plaintiff and Thing he paid the latter \$400 in full, and took an assignment of the sheriff's certificate to one Melrose for his own use and benefit.

After the sheriff's sale of the plaintiff's land, and before the payment of the \$400 by him to Thing, an agreement was made between the defendant and Thing, by which Thing received a note made by G. H. Warner for \$102, and a note made by L. I. Moore for fifty dollars, and agreed to release the defendant from said judgment, if such notes were paid at maturity. And he was also paid the additional sum of thirty-seven dollars. The agreement was made on the tenth of September, 1862, and the two notes matured between that time and the 24th of January, 1863. Those notes were paid at the times they respectively matured, and within four months after the first of September, 1862, the defendant paid Thing the thirty-seven dollars. And on the 8th of August, 1863, Norton, the assignee of the judgment, at the request of Thing, executed and delivered to the defendant, a satisfaction of said judgment as to all the defendants therein. When the defendant entered into the agreement made by him with Thing, the latter represented to him that the plaintiff had no interest in the land sold under the execution, and that nothing could be secured from the sale toward paying the judgment.

After the plaintiff discovered the agreement which had been made between Thing and the defendant, and what had been done under it, he brought an action against Thing to

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recover the \$400 he had paid him, and afterward recovered a judgment for the same, and received from Thing's estate upon the judgment so recovered, forty-two per cent of the amount. And after that, he brought the present action against the defendant for the purpose of recovering the amount so paid him, as the difference between that and the sum received from the estate of Thing. The cause was tried by the court without a jury, and judgment directed for the defendant. The plaintiff excepted to that conclusion and direction, and appealed from the judgment entered in pursuance of it.

S. S. Spring, for the appellant.

D. H. Bolles, for the respondent.

Present—MARVIN, DANIELS and TALCOTT, JJ.

By the Court—DANIELS, J. When the plaintiff brought his action against Thing to recover back the \$400 paid him, he must have done so upon the legal theory that the settlement and satisfaction of the judgment by the defendant, who was the party primarily liable for its payment, had the effect of securing to him the right to rescind and annul the sale of his land under the execution, and entitled him to an assignment of the certificate from Norton, without availing himself of the privilege provided for him by the agreement extending his right of redemption. If he was right in assuming that to be the relation existing between himself and Thing, as this court has decided he was, then he at that time had the privilege of rescinding the sale made by the sheriff, or if he did not elect to avail himself of that to treat the judgment as satisfied by means of it, and bring his action against the defendant as the primary debtor, for the recovery of the amount paid upon the debt by the sale. The latter remedy depended upon the affirmance of the sale itself, while the former was equally dependent upon the affirmance of the

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settlement made between the defendant and Thing, and the disaffirmance of the sale made under the execution. These remedies were so inconsistent that the election of one necessarily involved the exclusion of the other. By proceeding against Thing for the purpose of annulling the sale, the right of the plaintiff to succeed was dependent upon the fact that the judgment had been satisfied and discharged by the settlement and satisfaction made by the defendant. Without that, Thing was clearly entitled to retain the land sold upon the sale made under the execution, for the plaintiff's property had become legally bound for the payment of the judgment. It was only by force of that settlement and satisfaction by the defendant, as the primary debtor, that the plaintiff as a party secondarily liable, was placed in a situation in which he could require his land to be discharged from the sale. That circumstance entitled him to that relief in case he elected to avail himself of it. At the time when that privilege was secured to him he was ignorant of it; the settlement and satisfaction having been made without his knowledge. He accordingly proceeded under the sale so far as to pay the amount required by Thing to discharge his demands as the beneficial purchaser of the property. When that was done the certificate of sale was transferred to Melrose for his benefit, which in effect annulled the sale itself, and left the plaintiff at liberty when he discovered that Thing had received satisfaction of the judgment from the defendant either to proceed against him for reimbursement, or against Thing for the recovery of the money paid upon the assignment of the certificate. The plaintiff elected to pursue the latter remedy when the facts were ascertained by him. And by means of it recovered a judgment sufficient in amount to reimburse him if the estate of the defendant in the case had proved to be sufficient for its payment. That it did not, was not the fault of the defendant in the present case. After proceeding so far upon the assumption that the defendant had satisfied the judgment, it is now too late for him to assent that he satisfied it himself, and has therefore the right to recover the

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amount paid, from the defendant as the primary debtor. The plaintiff's remedy against Thing for the recovery of the money paid him involved the necessity of totally disaffirming the right of Thing to apply or retain it as a payment. When that was done the plaintiff entirely divested himself of all remedy against the defendant. For the remedy against the latter was dependent upon the fact that the plaintiff had been compelled to pay his debt. This could not be true after the payment made had been annulled by the act of the plaintiff himself, as it was by the recovery of his judgment. The plaintiff made his election between two inconsistent remedies, and his failure to secure satisfaction by means of the one which he adopted, forms no legal reason for permitting him to now resort to the other. The judgment at the circuit was right, and it should be affirmed with costs.

MARVIN and TALCOTT, JJ., concurring.

Judgment affirmed.

SIDNEY S. MARSH, Supervisor, &c., Respondent, v. THOMAS I. CHAMBERLAIN and others, Executors, &c., Appellants.

(GENERAL TERM, EIGHTH DISTRICT, FEBRUARY, 1870.)

The supervisors of Cattaraugus county had power under the act of April 17, 1865 (chap. 479, p. 860), to appoint three building commissioners, to locate and erect county buildings at Little Valley, who should have authority to consider donations of land and money in determining the location; by their resolution of appointment they directed their appointees to select and procure the title to a proper site for a sum not exceeding one dollar, and to proceed to erect the buildings thereon, but neither to obtain the title, nor take any binding steps until security should be given by bond of individuals and otherwise, guaranteeing payment for erection of the buildings without expense to the county.—*Held*, that the power to accept donations of money was vested in the supervisors, by whom provision for supplying the means to erect the buildings had to be made, and not in the building commissioners, and that a bond given as security for payment of donations, under the resolution, was within the policy of the law and valid.

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And the said building commissioners having proceeded according to the terms of the resolution to locate, erect and furnish the county buildings, in part upon the faith of a bond given to secure payment of money promised in that respect.—*Held*, that such bond was founded upon sufficient consideration.

And that one who had at the day of its date and before delivery indorsed upon the same over his signature, "I guarantee payment of the within bond," was bound by the guarantee, and that this was so irrespectively of the amendment of the statute of frauds. (1863, chap 464.)

The act of 1868 (chap. 13, § 1), authorizing an assignment of the bond to the supervisor of Little Valley.—*Held*, that an assignment made to said supervisor of the same with the guarantee, would be presumed to have been made under that act.

And any two of the building commissioners being authorized to erect the county buildings (1865, chap. 861, § 3).—*Held*, that an assignment of such bond and guarantee by that number of said commissioners was sufficient as an act incidental to the duties devolved upon them.

THE commissioners appointed by the governor under chapter 479 of the Laws of 1865, selected the village of Little Valley, in the county of Cattaraugus, as a proper place for the erection of the county buildings, including a court-house, clerk's office, and other offices and rooms, and a county jail. At a meeting of the board of supervisors of the county, held on the 15th of November, 1866, Frank L. Stowell, Lemuel S. Jenks, and John Manley, were appointed commissioners to select and determine upon a proper site in that village, not less than five acres in extent, for the erection of such buildings, to procure the title to such site at an expense to the county, not exceeding one dollar, and to proceed immediately with the erection of such buildings, according to the third section of that act. But before they took the title to the land, or did any other act that should commit the county to the removal of the county site, they were required to receive bonds from the towns of Little Valley and Napoli, and individual bonds, money and materials of sufficient amount, not less than \$30,000 in amount and value, to guarantee the erection and completion of the buildings provided for, and to insure the county against any and all taxation for the erection and completion of the buildings, or the sale therefor. And the commissioners were further instructed by

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the board to accept bonds of individuals, payable in money or materials, which might be guaranteed by responsible parties satisfactory to them, or which might be accepted by contractors, or to accept sums of money. And it was further resolved by the board that such bonds, materials and money should be used for the purpose of erecting such county buildings in the village of Little Valley, and for no other purpose. On the 24th of November, 1866, John Manley executed and delivered his bond to Lyman Twomley, who was then supervisor of the town of Little Valley, by which he bound himself to pay to the commissioners or their successors in office the sum of \$2,000 on demand, for the purpose of erecting the necessary county buildings. This bond on the same day was guaranteed by the testator by an indorsement made thereon, and subscribed by him in the following words: "I guarantee the payment of the within bond." It appeared that nothing was paid for the bond or the guarantee. And that the commissioners immediately qualified as required by law and the resolution appointing them, and entered upon the duties of their office, and erected the county buildings at Little Valley. The bond and guarantee upon it were assigned by two of the commissioners to Lyman Twomley, the supervisor of the town of Little Valley, on the 20th day of March, 1868. And the plaintiff in this action is his successor in office. Chapters 479 of the Laws of 1865, 566 of the Laws of 1867, and thirteen of the laws of 1868, were given in evidence on the trial. The defendants moved the court for a nonsuit on these facts. That motion was denied, and the defendants excepted. The court directed judgment for the plaintiff, and to that the defendants excepted. From the judgment entered in accordance with that decision the defendants appealed.

Henderson & Wentworth, for the appellants.

D. H. Bolles, for the respondent.

Present—BARKER, E. D. SMITH and DANIELS, JJ.

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By the Court—DANIELS, J. Under the resolution of the board of supervisors appointing the commissioners, they were in substance empowered and directed to select, and acquire the title to five acres of land in the village of Little Valley, as a site for the county buildings, and to proceed and erect such buildings upon it, only in case that could be accomplished by the voluntary contributions of individuals, and of the two towns mentioned in the resolution. It seems to have been contemplated that the land could be secured and the buildings erected upon it without subjecting the county to the burden of bearing any portion of the expenses; and the commissioners were appointed to accomplish that end in that manner, and not otherwise. If that could not be done then the new county buildings were not to be erected by them. If it could, then they were to secure the performance of the work. There was clearly no provision of any statute, nor any principle of the common law, which either expressly or impliedly forbid the county authorities from adopting that course for the acquisition of the necessary ground, and the erection of the county buildings upon it. If the board had reason for concluding that they could safely rely upon the generosity of the two towns, and of individual citizens who felt interested in and desired the success of the enterprise, for the donation of the land and the contribution of the materials and money which would be required to put up and complete the buildings, neither the law nor public policy prevented it from doing so. On the contrary, it was a discreet and judicious exercise of the authority which had been conferred upon it, for the purpose of securing the erection of the new county buildings. And it was in conformity with the spirit of the act under which they proceeded, which directed the commissioners, who were to be appointed by the governor, to designate the place to which the county buildings might be removed, to take into consideration, for the purpose of affecting or influencing their conclusion on that subject, any donations of land for a county site, or money to defray the expenses of building the county buildings. (Laws of 1865,

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864, § 13.) As the commissioners who were to consider those donations for that purpose had no authority to accept them, and no such authority was placed anywhere by the act, it must have been intended that they were to consider the donations, which might be simply offered, for those purposes, and that they could afterward be accepted and received by the authorities of the county, in case the change determined upon should be actually made. It must have been donations of land and money proposed, that these commissioners were thus empowered to consider in their designation of the county site, as distinguished from donations actually made. And they were evidently only authorized to consider them, because they might afterward be reasonably expected to be available for the location and erection of the county buildings. And that constructively empowered, the board of supervisors, when it afterward came to provide measures for the erection of the county buildings, to take the course which it did for the purpose of securing the donations proposed to be made. If those afterward offered were not within the expressed design and object of the act, they were evidently so clearly within its policy as to prevent contracts made concerning them from being declared unlawful as opposed to public policy. For they contributed to the accomplishment of the results, which the act contemplated might be partially or wholly secured by private donations and benefactions. And as no particular mode was provided by the law, through which that might be done, the board were necessarily left at liberty to adopt any course adapted to that end, which expediency and convenience might suggest. And no objection in either respect can well be urged against that which was provided by the resolution. If there were any, it was removed by the act of 1867, which declared the bonds and obligations taken by the commissioners, acting under the resolution of the board, to be valid and binding, and provided for their collection by them. (Laws of 1867, 1525, § 5.)

When the bond of Manley, with the testator's guarantee,

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was taken by the commissioners, it was in no sense whatever an unlawful contract, but one which was binding upon the parties, if founded upon a sufficient consideration. The board itself declared that the money which the obligor bound himself to pay, was to be paid for the purpose of erecting the necessary county buildings, and to that extent it must have directly operated as an inducement to the commissioners to undertake and proceed with the work. That they were authorized by the resolution to do, upon precisely such obligations. And as this was given just nine days after the resolution was adopted, it may reasonably be supposed that it was done in view of the terms used in that resolution. The commissioners were only authorized to accept the land, and proceed with the erection of the building after they had received town and individual bonds, money, and materials, amounting to not less than \$30,000. And it was not shown that they did proceed, before they had in that manner received that sum. But as they afterward erected and finished the buildings provided for, and had no other means for doing it than those they were authorized to receive under the resolution appointing them, they must have done so upon the faith and expectation that the promised contributions toward the work, would be provided according to the terms of the obligations given to them for that purpose. And if they did, that supplied a sufficient consideration for the obligations entered into, and delivered to them, for the purpose of inducing them to receive the title to the land, and erect the county buildings upon it. (*Barnes v. Perinc*, 2 Kernan, 18, 24, 28.)

The guarantee made by the testator was indorsed and executed upon the bond on the same day that the latter was made, and before it was delivered to the commissioners who were the obligees named in it. The bond had not therefore, at that time, become binding as a legal obligation upon the obligor, and no additional consideration was required for the purpose of rendering the guarantee legal and binding beyond that upon which the bond depended and was expressed on

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its face. The consideration sustaining the principal obligation was sufficient, under those circumstances, for that of the collateral agreement made by the testator. They were both made for the same purpose, and that was to induce the commissioners to acquire the title to the land selected for the site of the county buildings, and to erect those buildings upon it. That sufficiently appears from the face of the bond; and as the guarantee, for the purpose of ascertaining its consideration, should be construed together with the bond with which it was given, that also discloses a legal consideration for the guarantee. For this purpose, as they were both practically made at the same time, they are required to be construed together; and as thus construed, if a sufficient consideration appears from the face of the principal obligation to render it valid and binding, that will also impart legal validity to the collateral undertaking accompanying it. (*Union Bank v. Executors of Coster*, 3 Com., 203, 209-10; *Church v. Brown*, 21 N. Y., 315; *Bainbridge v. Wade*, 1 Eng. Law & Eq., 236; *Bailey v. Freeman*, 11 John., 221, 223.) In cases of that description the guarantee does express a sufficient consideration, though none be actually stated by the terms in which it alone may have been made. For that purpose it is to be construed as incorporating within itself the agreement or instrument to which it may be collateral. And as so construed, the guarantee in the present case appeared by its terms to express a sufficient consideration to render it binding upon the testator. That is all that is required to constitute a compliance with the statute of frauds, even though, as amended by chapter 464 of the Laws of 1863, it should still be construed as rendering it necessary that the collateral undertaking should express the consideration on which it was given.

The act of 1868 provided for the assignment of a certain amount of the bonds and obligations held by the commissioners to the supervisor of the town of Little Valley. (Laws of 1868, 12, § 1.) And the assignment to him of the bond and guarantee in suit may be properly inferred to have been

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made under that authority. It was not invalid because it was executed by but two of the commissioners. For any two of them were authorized by the statute to erect and put up the county buildings. (Laws of 1865, 861, § 3.) And this was an act incidental to the discharge of the duties connected with the promotion of that enterprise. They could only do that by securing the means required for that object, and the assignment made contributed to the production of those means. It was necessarily connected with the other duties the assignors, as commissioners, were required, and, which any two of their number, were authorized to perform. The judgment recovered by the plaintiff was right, and it should be affirmed with costs.

BARKER and E. DARWIN SMITH, JJ., concurring.

Judgment affirmed.

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THE PEOPLE ex rel. THE DUNKIRK AND FREDONIA RAILROAD
COMPANY v. JOHN I. CASSITY and others, Assessors of the
Town of Dunkirk.

(GENERAL TERM, EIGHTH DISTRICT, FEBRUARY, 1870.)

A horse railway, constructed along and upon the grade of a highway, by laying rails of the ordinary dimensions upon pine stringers, fastened together with similar ties, together with the right (acquired partly by grant from adjoining owners, and partly by proceedings under the general railroad law), qualified by the public easement, to maintain and operate the road thereon, owned by a company chartered for fifty years, is assessable as real estate.

THIS cause was brought before this court by virtue of a common law certiorari, issued to the assessors of the town of Dunkirk. It appeared from the return made to the writ, that the relator was a railroad corporation, organized under and in pursuance of chapter 265 of the Laws of 1864, as amended by chapter 34 of the Laws of 1866, for the purpose of constructing and operating a horse railroad through and upon

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certain streets and highways of the village and town of Dunkirk, and of the town of Pomfret and village of Fredonia, from the depot of the Erie Railway Company, in the village of Dunkirk, to a point at or near the Johnson House, in the village of Fredonia. That the company completed its organization, and filed its articles of association in the office of the secretary of State, in the month of December, 1865, and it afterward constructed its railroad track through and upon certain streets and highways mentioned and described in the return, between the points before mentioned. For the distance of about two miles and a half this road was constructed in the bounds of the village and town of Dunkirk. The railroad was constructed on the grade of the streets and highways used for that purpose, in a good, substantial manner, with pine ties and stringers, with wrought iron rails one inch in thickness by two and a half inches in width. The tracks of the railroad were located wholly within public streets and highways, and not less than six feet from the center thereof. The relator never had the exclusive use of the part of the streets and highways in and on which the tracks of the railroad were laid; but such parts had been used, occupied and traveled by the public in common with the relator, except when the cars ran on the tracks, and then precedence was claimed and exercised by the relator. The respondents assessed the relator on account of this railroad, as the owner of real estate in the town of Dunkirk, and liable to taxation for the same. The relator appeared before the respondents and objected to the assessment as illegal, but the objection was overruled, and the assessment confirmed. The relator thereupon sued out the present writ for the purpose of reviewing the action and decision of the respondents.

William A. Barden, for relator.

F. S. Edwards, for respondents.

Present—MARVIN, E. D. SMITH and DANIELS, JJ.

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By the Court—DANIELS, J. Before the railroad was constructed upon the streets and highways over which it passes, the relator, by voluntary grants from the owners of the fee in the soil, acquired the right of way for it, for the purpose of building, laying down, constructing and operating its railroad. These were the terms used in the grants for the purpose of designating and describing the interest which the relator acquired in the land required to be appropriated to the use of the railroad. And they were taken from all the adjacent land owners, whose lands were bounded by the streets and highways made use of, with one single exception, and in that, the interest required by the relator in the land was taken under the proceedings provided for by the general railroad law, which in that and other respects, was rendered applicable to this corporation. The relator was authorized and empowered to construct and maintain a railroad through the streets and highways made use of, for a period not exceeding fifty years. (Laws of 1864, 626, § 4.) And the interest, acquired by means of the grants and proceedings taken, were therefore commensurate with the extent and duration of that privilege. This interest, although an easement, qualified by, and to some extent subject to, the more general one existing in favor of the public over the same streets and highways, was still an interest as well as an important one in the land itself, beyond that previously secured to the public. (*Williams v. N. Y. Central R. R. Co.*, 16 N. Y., 97; *Mahan v. Same*, 24 id., 658, 661; *Craig v. Rochester City and B. R. Co.*, 39 N. Y., 404.) It conferred upon the relator not only the right of passing over the streets and highways, but the additional right of appropriating so much of them as was conveniently required for the purpose, to the permanent support of the superstructure required for their use. While this did not necessarily exclude the traveling public from the use of that portion of the streets and highways, it did none the less on that account amount to an actual appropriation of that portion of them to the relator's uses. And for any tortious injury to the relator's superstructure, an action could

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be maintained by it against a wrong-doer. The ties, stringers and superstructure constructed with them remained the property of the relator; and under the interest in the land which it had acquired, it was entitled to claim that so much of the streets and highways as was lawfully appropriated by it for their construction into a railroad, should be permanently devoted to their maintenance and support in that respect. To that extent the relator not only acquired an interest in the land itself, but beyond that, it also acquired a qualified possession of so much of it as was used in that manner and for that purpose; and it could maintain trespass for any unlawful injury to its rights in that respect. (*Dorney v. Cashford*, 1 *Ld. Ray.*, 266; *Harrison v. Parker*, 6 *East*, 154; *Dyson v. Collick*, 5 *Barn. & Ald.*, 600; 7 *Eng. C. L.*, 203.) Its interest constituted title to lands to such an extent that a Justice's Court would have no jurisdiction over it in actions drawing in question the validity of its rights. (*Striker v. Mott*, 6 *Wend.*, 465; *Saunders v. Wilson*, 15 *id.*, 338; *Randall v. Crandall*, 6 *Hill*, 342.) And it could only be acquired by grant, or proceedings equivalent to a grant in their effect upon the title. (3 *Kent*, 7th ed., 528-9.) This interest certainly was not personal estate, and if it was not, it was as clearly a portion of the realty. And when the relator's superstructure was annexed and affixed to it, that was rendered by the attachment a portion of the same quality of property. By the grants delivered to the relator and the proceedings taken by it, the right was secured in the soil, of permanently constructing and maintaining a railroad upon it. This was an interest of a fixed, definite and permanent character in the land, and the superstructure was constructed upon it in such a manner as to render that an addition to that interest, and to appropriate both, to a useful and profitable employment.

If the interest acquired had formed no part of the streets and highways of the town, but had been solely confined to private property, the relator would not have claimed that the superstructure afterward placed upon that was not to be

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deemed real estate. And yet, the difference between such a case and the present one, is simply one of degree. In each case the superstructure is affixed to an interest acquired for that purpose in the land, and designed to be permanently used with it. Either, without the other, would be useless; but both combined together constitute an entire and valuable property. In ordinary cases, when the superstructure is added to the land, the annexation renders what previously was personal, afterward real estate, and liable to be assessed as such. This point was fully discussed and definitely decided in the case of the *People v. Fredricks and others* (48 Barb., 173, 180, 181); and in *Mohawk and Hud. R. R. Co. v. Clute* (4 Paige, 384, 395). And no reason can exist for denying the same result to the act of attachment in the present instance. Though the estate in the relator may be less, it was still sufficient to form an interest in the land, and for that reason to change the character of the property affixed to it, for the purpose of being advantageously used and enjoyed with it.

The statute defining the term "land," for the purposes of taxation, does not require that the fee, or any other particular estate, shall be owned in it, in order to render it taxable as land. For that purpose the term is required to be construed as including not only the land itself, but all buildings and other articles erected upon or affixed to the same, &c. And that is broad and comprehensive enough to include the relator's superstructure, for it was composed of articles affixed to the land itself, not for a temporary purpose, but for permanent use and profit. This definition was declared to be a general one, and to include the terms "real estate" and "real property," whenever they occur in the chapter relating to the subject of taxation. (1 R. S., 5th ed., 905, § 3.) The next section of the same title providing that corporations shall not be taxed upon their capital as personal estate, for that portion of it that may have been invested in real estate, indicates that it was not intended that any particular estate should be required to constitute the term land. (1 R. S., 5th ed., 906,

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§ 4.) For the purpose of excluding that portion of the capital from taxation as personal property, all that was required was that it should be invested in real estate. And so much of the relator's capital as was paid for the right to construct and maintain its railroad upon the streets and highways in question, and for the superstructure afterward made upon them, was invested in real estate within the terms used by this section. It could not, therefore, be lawfully taxed as personal estate under the description given by this section of that species of property. And if not taxable as real estate or land, under the preceding section, it would escape taxation altogether.

A similar interest was held to be taxable as land under this statute in the case of the *People v. Beardsley* (52 Barb., 105). In that case, the relator had secured the privilege of constructing a railway over the Allegany reservation of Indian lands. And by the contract conferring it, there was a special restriction imposed upon the relator by which it was provided that it should not vest the fee of the land, as it clearly could not while it was a portion of the reservation, in the railroad company, nor the right to occupy the same for any purposes other than what might be necessary for the construction, occupancy and maintenance of the railroad. (Id., 107.) This certainly was no greater interest than the relator in the present case acquired. And it was held, as to that interest in that case, that it could be properly taxed as real estate. Since then, that decision has been affirmed by the Court of Appeals solely upon the ground that the interest secured by the contract, and the superstructure made upon the land was legally taxable as real estate under the terms of the statute.

The case of the *People v. The Board of Assessors of Brooklyn* (39 N. Y., 81), contains nothing in conflict with this conclusion. For the main pipes which were then held not to be taxable as land, were neither erected upon nor affixed to the land. And for that reason they were held to be exempt from taxation as real estate. (Id., 87.)

The assessment complained of as erroneous in the present

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case was legal and proper within the statute referred to, and the proceedings of the respondents should therefore be affirmed.

MARVIN and E. DARWIN SMITH, JJ., concurring.

Assessment confirmed.

HERMAN D. M. MINER, Receiver, &c., Respondent, v.
CHARLES K. JUDSON, Appellant.

(GENERAL TERM, EIGHTH DISTRICT, APRIL 18, 1870.)

The charter of a mutual insurance company provided, that upon alienation of property insured, the policy should be void and surrendered for cancellation, and the assured entitled upon the surrender and payment of his proportion of the losses incurred prior thereto, to his premium note, but that the alienee might have the policy, if assigned to him, ratified for his benefit, on giving security for the sum remaining unpaid upon such note, and thereupon should be entitled to the privileges, and subject to all the liabilities of the party originally owning the policy; the defendant who held a policy for which he had given his premium note to be paid in sums and at times, as required under the charter and by-laws of the company, by the directors, conveyed the insured property, and with the company's assent assigned the policy to his grantee, and it was then by like assent reassigned to the defendant as collateral security for a debt due him from the grantee, who had also given a note in like terms with that of the defendant to the company; the company also retained the defendant's note and the latter paid assessments upon it for losses, happening after the assignments of the policy. In an action by a receiver of the company against the defendant on his note.—*Held*, that the defendant was not liable thereon, and the plaintiff could not recover.

THE plaintiff brought this action as the receiver of the Jamestown Farmers' Insurance Company, upon a premium note made and delivered by the defendant to that company on the 20th day of August, 1853. The note was made and delivered in consideration of a policy of insurance, issued by the company to the defendant, upon a printing press, type, furniture, stock and materials owned by him, and situ-

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ated in Randolph, in the county of Cattaraugus. By this policy, the company insured the defendant against loss and damage by fire upon such property, to the amount of \$750 for the period of five years. The business of the company was exclusively that of mutual insurance, and by the terms of the defendant's note, he promised to pay the company, or its treasurer, for the time being, the sum of \$165, in such portions, and at such time or times, as the directors of such company might, agreeably to its charter and by-laws, require.

By the evidence given upon the trial, which was had before a referee, it appeared that the defendant sold his property in Randolph to B. F. Morris, and with the consent of the company assigned over the policy to him. The assignment of the policy bore date the 8th day of December, in the year 1853, and the consent of the company to the assignment bore date on the 12th of December, 1853. The company at the same time consented that Morris might assign the policy to the defendant as a collateral security for a demand due to him from Morris, and for that purpose Morris, at the time when the policy was assigned to him, reassigned it as collateral security to the defendant. When the policy was assigned to Morris, he made and delivered his own note to the company for the payment of the premium, in the same amount, and the same form, as the note previously given for that purpose by the defendant. And the company still retained the possession of the defendant's note. This note was assessed by the directors of the company for the payment of losses incurred in 1854 and 1856, and the assessments made were paid by the defendant, and subsequent payments were made upon his note by the defendant, in printing, amounting to the sum of fourteen dollars. All the payments made upon it by the defendant, after the assignments of the policy, amounted to thirty-two dollars and fifteen cents. The losses, for the payment of which the assessment in controversy was made, accrued after the assignments of the policy, and the making and delivery of the new note by Morris.

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Sections 3 and 13 of the charter of the Jamestown Farmers' Insurance Company, read respectively as follows :

"Section 3. All persons who shall insure with the said company, and also their heirs, executors, administrators, and assigns continuing to be insured in said company, as hereinafter provided, shall thereby become and continue members thereof during the period they shall remain insured by said company, and no longer."

"Section 13. When any property insured by this company shall be alienated by sale or otherwise, the policy shall thereupon be void and be surrendered to said company to be canceled ; and upon such surrender the assured shall be entitled to receive his deposit note upon the payment of his proportion of the losses and expenses that have occurred prior to such surrender ; but the grantee or alienee, having the policy assigned to him, may have the same ratified and confirmed to him for his own use and benefit, on giving proper security, to the satisfaction of the directors, for such portion of the deposit or premium note as shall remain unpaid, and by such ratification and confirmation, the party causing such security to be given, shall be entitled to all the privileges *and be subject to all the liabilities*, to which the original party to whom the policy was given was entitled and was subjected under this charter."

The referee reported in favor of the plaintiff, and from the judgment entered upon the report the defendant appealed.

A. H. Judson, for the appellant.

Stephen Snow, for the respondent.

Present—MARVIN, TALCOTT and DANIELS, JJ.

By the Court—DANIELS, J. The sole consideration for the defendant's note to the company was the agreement contained in the policy, to insure his property ; and when that was terminated by a sale of the subject of the insurance it was con-

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templated by the charter that the liability of the company under its agreement should cease, and that the defendant should incur no liability to contribute to the payment of losses occurring after that time. By the express provisions of the charter he continued to be a member of the company only so long as he continued to be insured by it. And when the property owned by him and insured by it, was alienated by sale, it was declared that the policy should be void and be surrendered to the company to be canceled; and upon such surrender he should be entitled to receive his note upon the simple condition of paying his proportion of the losses and expenses occurring prior to such surrender. These provisions clearly intended that both the liability of the company upon its policy and the future liability of the defendant upon his note, should be terminated by force of the act of selling the subject-matter of the insurance. If he failed to surrender the policy as he was required to do by the charter when he made such sale, neither the liability of the company nor his own, could be prolonged by such failure; for no such consequence as a continuance of his liability for future losses was in that event provided for by the charter. The only consequence resulting from such failure would be that he could not secure the actual surrender of his note upon the payment of his proportion of prior losses and expenses. Without surrendering it the policy would become void by reason of the sale, and as the policy formed the only consideration for the note, the liability of the maker of it for future losses would necessarily cease from that time. (*Tuckerman v. Bigler*, 46 Barb., 375.) That this was the design of the provisions inserted in the charter upon the subject is shown by the right secured to the alienee. For, after the purchase of the property insured, he, upon securing an assignment of the policy, could have it ratified and confirmed to him for his own benefit, on giving proper security, to the satisfaction of the directors, for the portion of the premium note remaining unpaid. And it was provided in the charter, that upon such ratification and confirmation, the alienee should

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be entitled to all the privileges, and be subject to all the liabilities to which the original party to whom the policy was given was entitled and subjected under the charter. These are the only legal consequences resulting from the revival of the insurance in favor of the alienee; and the continued liability of the vendor is not among them. On the other hand, the revival of his liability is plainly inconsistent with the results declared and provided for. Because the assignee and vendee is to become subject to all the liabilities of the original party, upon the policy being revived and continued in his favor. And that could not be true, if the person originally insured still continued liable upon his note. But beyond that, the charter provided that the vendee and assignee could have the policy ratified, and confirmed to him for his own use and benefit, not for the use or benefit of the vendor, and not upon his deposit note, but solely upon the assignee and vendee furnishing the proper security for that purpose. By that means the policy rendered void by the sale could be revived as an insurance in favor of the assignee and vendee. He was provided with the means of rendering it an insurance in his own favor, for which it would have been entirely unreasonable, as well as unjust, to have imposed a liability for the premium upon the vendor.

This view of the charter is confirmed by the mode in which the business was actually transacted. For the note taken by the company from the vendee was in form precisely the same as that taken when the policy was issued, from the defendant. This note, and the revival of the policy by the confirmation and ratification of the company was, in legal effect, a new contract between it and the vendee of the insured property. For it rendered the company liable to pay him for any loss incurred by means of injury to the property by fire during the future portion of the term mentioned in the policy, and bound him to pay the entire consideration for the insurance. And these new agreements were plainly designed to supply the places of those that had been avoided by the sale. The effect of the sale of the property, the

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assignment of the policy, and its revival as an insurance to the vendee upon the liability of the defendant on his note, was not changed by the circumstance that he afterward, with the assent of the company, received an assignment of the policy as collateral security for a debt owing him by the assured. For it was no part of that transaction, that he should continue to be liable to the company upon his own note. The charter required no such continuance of his liability, in order to entitle him to hold the policy as a mere security, when it was in fact an insurance upon the property owned by the assignor. It was only when the assignee was also the purchaser of the insured property, and he desired to secure the revival of the policy, as an insurance for his own use and benefit, that the charter required him to secure the unpaid portion of the assignor's premium note. A simple assignee of the policy as security, was within neither the language, nor the spirit of that portion of the charter.

The judgment should be reversed and a new trial ordered, with costs to abide the event.

MARVIN and TALCOTT JJ., concurring. Judgment reversed.

SAMUEL McGUIRE, Respondent, v. RUFUS JOHNSON, Appellant, impleaded with HANNAH L. GLOVER.

(GENERAL TERM, SIXTH DISTRICT, JANUARY, 1870.)

In an action on a promissory note against the two joint makers thereof, one of whom establishes a defence on the ground of coverture, judgment may go against the other defendant.

THIS appeal was taken by the defendant, Johnson, from a judgment entered against him on the verdict of a jury in the Courtland County Court upon a retrial on appeal. The action was upon a promissory note, running as follows, viz.:

"For value received we jointly promise to pay John Glo-

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ver or bearer forty-four dollars and forty-five cents on or before the first day of December next, with interest.

"Dated *May* 1, 1865.

Signed,

"HANNAH GLOVER.
RUFUS JOHNSON."

It appeared that the defendant, Glover, was a *femme covert* when she executed the note and that her husband was still living, and the defendant, Johnson, objected that there could be no judgment against him on account of the coverture. The court overruled the objection, and the jury gave a verdict against Johnson for the principal and interest of the note with costs, and he thereupon appealed.

Ballard & Warren, for the respondent.

Ira L. Little, for the appellant.

Present—BALCOM, BOARDMAN, PARKER and MURRAY, JJ.

By the Court—BALCOM, P. J. The note on which the action was brought was joint, but not several. It was signed by two persons as makers, but one of them (Mrs. Glover) was a married woman and had a verdict in her favor in the County Court by reason of her coverture and the want of other facts to make her liable for the payment of the note. The County Court held that the plaintiff could recover on the note against the other maker (Johnson), though Mrs. Glover was not liable on the same. The question in the case, therefore, is, whether Mrs. Glover's defence of coverture destroyed the right of action in respect to the defendant, Johnson, who was only a joint maker of the note with her.

The general rule of law before the passage of the Code of Procedure was that in actions against several persons on a joint contract, the plea of one, if found true, acquitted all. Yet to that there were exceptions; as where one pleaded the insolvent act, bankruptcy, infancy or other defence merely

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personal in its nature, a recovery could be had against the other joint contractors. (2 Cow. Tr., 2d ed., 1012 and 1013; *Hartness v. Thompson and wife*, 5 Johns., 160; *Cruikshank v. Gardner*, 2 Hill, 333; *Camp v. Gifford & Seymour*, 7 id., 169.)

It is provided by section 274 of the Code, that "judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants." The Court of Appeals held in *Brumskill v. Eaglesum and wife* (1 Kernan, 294), that the Code of Procedure has modified the *general* common law rule, that, in an action upon an alleged joint contract, the plaintiff must recover against all the defendants or be defeated in the action. And in that case, the action was against two persons upon a note alleged to have been made by them in 1846, as copartners in their firm name, and it was proved that the note was signed by one in the alleged firm name, and that the other defendant was then his wife; and it was held that the plaintiff could recover against the husband alone. (See *Marquat v. Marquat and wife*, 2 Kernan, 336.)

Counsel for the defendant, Johnson, has argued that the promissory note of a married woman is absolutely void, and that no joint contract of the defendants ever existed for the payment of the money mentioned in the note in suit, and that, therefore, no recovery could be had on the note against Johnson alone. I shall not stop to inquire whether married women may not make valid promissory notes under our statutes; for I am of the opinion that the defendant, Johnson, was liable to pay the note though it were conceded that the note was absolutely void as against Mrs. Glover, by reason of her coverture. No case has been cited, and I confess I have not been able to find one holding that in an action against two persons on a joint contract or joint promissory note, and one pleads coverture at the time of the execution of the contract or note, such defence, if proved, destroys the right of action against the other defendant. But it is laid down in Story on Promissory Notes, that although a bill or

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note, to which a married woman is a party, "may not be binding personally upon the woman herself, either as a drawer or indorser, or acceptor; yet, as between the other parties to it, it may be of full force and obligation. Thus, if a bill be drawn or indorsed by a woman, under circumstances of interdiction, still, if accepted, it may be binding between the indorsee, or other holder, and the acceptor. And in like manner, a promissory note drawn or indorsed by a woman under interdiction, will be binding between the other parties thereto." (Story on Promissory Notes, 5th ed., § 91.)

It is clear that if Mrs. Glover had been an infant, *femme sole*, when she signed the note, and had defended the action, on the ground that she was not bound to pay it, because she was under twenty-one years of age when she gave it, that defence would not have destroyed the right of action against the defendant Johnson, and the plaintiff could have recovered against him. (See 5 Wend., 224, 15th ed., 64; *Slocum v. Hooker*, 13 Barbour, 536.) I am unable to see any difference in principle between a defence by Mrs. Glover, of coverture and one by her of infancy, so far as the rights of her co-defendant, Johnson, are concerned. And I am of the opinion, that Johnson is liable upon the note in this action, although Mrs. Glover is not, within the principle of the decision in *Brumskill v. Eaglesum and wife* (*supra*).

If these views are correct, the judgment of the County Court in the action, against Johnson alone, should be affirmed with costs.

Judgment affirmed.

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ELIAS J. CRANDALL, Plaintiff in Error, v. THE PEOPLE, &c.,
Defendants in Error.

(GENERAL TERM, SIXTH DISTRICT, JANUARY, 1870.)

Chapter 8, of the Laws of 1848, providing for the punishment of seduction under promise of marriage, enacts that "no conviction shall be had under the provisions of this act on the testimony of the female seduced, unsupported by other evidence." Where, on the trial of an indictment under this act, the prosecutrix testifies to the promise, intercourse, and other facts, essential to constitute the offence, and other testimony tending to support her upon such points is given, whether or not she is sufficiently supported to justify a conviction is a question for the jury.

It seems that if a prisoner has not, under the act of 1869 (chap. 678), offered his own testimony upon his trial, it is error if the court, against his objection, permit the counsel for the prosecution in addressing the jury, to comment on the omission as a circumstance against him, or a fact to be considered in determining the case.

THE plaintiff in error was tried at the Chenango County Court of Sessions in December, 1869, on an indictment charging him with seduction under promise of marriage, under chap. 111 of the Laws of 1848. The jury found him guilty and the court sentenced him to imprisonment at hard labor in the State prison at Auburn for the term of two years. He made a bill of exceptions, taken on his trial, which formed a part of the record of his conviction.

The case was brought into this court by writ of error, but no stay of execution of the judgment was granted.

E. H. Prindle, for the people.

J. S. Newton, for the plaintiff in error.

Present—BALCOM, BOARDMAN, PARKER and MURRAY, JJ.

By the Court—BALCOM, P. J. The statute under which the prisoner was indicted, convicted and sentenced, is as follows: "Any man who shall, under promise of marriage, seduce and

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have illicit connection with any unmarried female of previous chaste character, shall be guilty of a misdemeanor, and upon conviction, shall be punished by imprisonment in a State prison not exceeding five years, or by imprisonment in a county jail not exceeding one year; provided that no conviction shall be had under the provisions of this act, on the testimony of the female seduced, unsupported by other evidence." (Chap. 111, Laws of 1848; Laws of that year, p. 148.)

Points were made and exceptions were taken by the prisoner's counsel as the evidence was given and during the charge of the court to the jury, on the ground that the testimony of the prosecutrix, who testified that she had been seduced by the prisoner under a promise of marriage, was unsupported by other evidence.

The facts that the prosecutrix was unmarried and only twenty-two years of age at the time of the trial, and that the prisoner visited her as a lover, and said, in substance, that he intended to marry her in the summer of 1866, were proved by other witnesses. Other witnesses than the prosecutrix testified that she and the prisoner lived at the same house in the summer of 1867. One witness, who frequently saw them together talking with each other, testified that he thought "their attentions were different from what those of any common hired man and woman would be;" also, that he thought "they acted as if they were fond of each other."

The prisoner did not visit the prosecutrix in the winter of 1866 and 1867. But when they were living, as servants, at the same house in the spring of 1867, they were frequently seen talking to each other, alone, according to the testimony of two other persons who were there; and these two witnesses testified to facts showing that the prisoner had opportunities for being alone with the prosecutrix where he could have had sexual intercourse with her at the time at which, as she testified, he had seduced her.

The evidence shows that the prosecutrix was received in such society as there was in the neighborhood where she resided, before the fact became publicly known that she was

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pregnant. Her mother testified that she was delivered of a child at a date corroborative of her testimony. And no person can read all the evidence in the case without being satisfied that the prisoner was guilty of seducing the prosecutrix under promise of marriage.

The statute does not define the extent that the prosecutrix must be supported by other evidence to warrant a conviction in a case like this.

The fact that the prosecutrix went in good society before she became pregnant was evidence that she was "of previous chaste character." The proof by a brother of the prosecutrix that the prisoner visited her as a suitor in 1866, and said he was the owner of a farm in Pharsalia and he and the prosecutrix were going there to live, supported the prosecutrix on the question that the prisoner promised to marry her.

The evidence justifies the conclusion that the prisoner broke his engagement to marry the prosecutrix in the winter of 1866 and 1867; and that thereafter he did not intend to marry her until they lived at the same house, as laborers, in the spring of 1867. But the just inference from the testimony of Walker and Thornton, is that the prisoner and prosecutrix became reconciled as lovers during that spring; and, their evidence that the prosecutrix and the prisoner then lived in the same house, and were frequently talking together alone and seemed to be fond of each other, supported the testimony of the prosecutrix that the prisoner then renewed his promise to marry her. And I am of the opinion, whether the testimony of the prosecutrix was sufficiently supported by other evidence, to justify the conviction of the prisoner, was a question for the jury; for she was corroborated by some evidence given by other witnesses upon the material points in the case.

I think the true rule, in cases like this, is, when there is some evidence given by other witnesses, which supports the testimony of the prosecutrix, on the material questions in the case, the jury must determine whether she is sufficiently corroborated to warrant a verdict of guilty. And this con-

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clusion is in harmony with the decision in *Kenyon v. The People* (26 N. Y. Rep., 203).

During the argument of counsel for the people to the jury, he alluded to the fact that the prisoner had not been sworn in the case, and claimed that counsel for the prisoner could not consistently deny the truth of the prosecutrix's statements in certain respects; when the prisoner's counsel objected to any argument against the prisoner, based upon the fact that he had not been sworn, and asked the court to rule that no inferences or presumptions could be drawn against the prisoner from the fact that he had not been sworn, and to require the counsel not to discuss that fact to the jury. The court then ruled that no inferences or presumptions could be drawn against the prisoner, because he was not sworn as a witness in the case; but said that the court could not prescribe rules for the argument of counsel. The prisoner's counsel excepted to this last statement of the court. The people's counsel (continuing his argument) then stated to the jury, in substance, that he supposed he must not mention the fact that the prisoner had not been sworn, nor hint at it in any manner; but insisted that he had the right to claim that the evidence of the prosecutrix upon certain points was entirely uncontradicted by any person. To which argument the prisoner's counsel objected and excepted. No further allusion was made by the people's counsel to the fact that the prisoner had not been sworn.

The court charged the jury as requested by the prisoner's counsel, that the fact that the prisoner had not made himself a witness, could not be used to his prejudice, nor could any inference against him be drawn therefrom, nor create any presumption against him.

The statute is that the neglect or refusal of any prisoner to testify on his trial "shall not create any presumption against him." (Laws of 1869, vol. 2, p. 1597.) And I am of the opinion it is the duty of the court to prevent counsel for the people commenting to the jury on the fact that the prisoner has not testified as a witness in his own behalf. The court

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erred in this case by ruling that they could not prescribe rules for the argument of counsel, so far as the ruling applied to the question whether the people's counsel could comment upon the fact that the prisoner had not been sworn. But the people's counsel did not thereafter argue that any inference could be drawn against the prisoner because he had not been sworn. This fact, and the ruling and charge of the court, that no inferences or presumptions could be drawn against the prisoner because he had not been sworn as a witness in the case, rendered the refusal of the court to prevent the people's counsel commenting on the prisoner's omission to testify in his own behalf harmless. The error of the court was like a decision to admit improper evidence when no evidence is given under the decision. But I think, if the people's counsel had argued to the jury, after the court refused to prevent him, that the fact that the prisoner had not been a witness for himself was a circumstance against him or a fact that they should consider in determining the case, the refusal of the court to stop that line of argument would have entitled the prisoner to a new trial. But it is unnecessary to decide this question in this case.

It is unnecessary to notice the numerous requests of the prisoner's counsel respecting the charge of the court to the jury, or the many exceptions to parts of the charge, or to refusals to charge the jury; for no error was committed, to the prejudice of the prisoner, by the refusals to charge the jury, or in the charge made, when the whole charge is considered together.

I am of the opinion, if the court had read the statute to the jury under which the indictment was found, and had then said to them that they had no right to convict the prisoner on the testimony of the prosecutrix, unsupported by other evidence, and that it was their province to determine whether she had been sufficiently supported by other evidence to justify them in finding the prisoner guilty, the charge would have been all that was required by the case

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upon the evidence. The charge was as favorable to the prisoner as the one I have said would have been sufficient.

In regard to the whole case, I will say we think no error was committed on the trial which would justify this court in reversing the judgment of the Court of Sessions. And our conclusion is, that the judgment should be affirmed.

Judgment affirmed.

JOHN HODGE, Respondent, v. GEORGE ADEE and JAMES SMITH, Appellants.

(GENERAL TERM, SIXTH DISTRICT, JANUARY, 1870.)

Possession of a chattel for an indefinite time, with an agreement to pay for its use, and an understanding with the owner that the holder may purchase at any time, does not constitute a leviabie interest therein.

But where a chattel was so held, and a levy made thereon, and a sale of the chattel under execution against the property of the holder, who intermediate the levy and sale purchased the chattel,—*Held*, that the levy held good, notwithstanding a renewal, in due time, of the execution prior to an adjourned day of sale (the notice having been originally for a time not within sixty days from the date of the execution), and although, previously to the execution sale, there had been a resale to the original owner, who knew of the levy.

Where the possession and withholding of personal property, obtained through an execution sale thereof, constituted the unlawful taking and conversion in an action therefor, and the summons was delivered for service by a justice of the peace to a person duly deputed by him, though not a regular constable, before the sale, and was served on the defendants immediately after,—*Held*, that the action was commenced before the cause of action accrued, and that it could not be sustained.

THIS action was brought before a justice of the peace upon a complaint for wrongfully taking and converting a cow, valued at sixty dollars. The defendants pleaded a sale by the defendant, Smith, as constable, under execution against one Tupper, upon a judgment of a justice of the peace at Delhi, in Delaware county, rendered on or about August 27, 1864.

The summons in this action was issued September 23, 1867, and judgment recovered in favor of the plaintiff, from which

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the defendants appealed, and had a new trial in the County Court, where a jury gave a verdict for the plaintiff, upon which judgment was entered for \$112.78 damages and costs, and the defendants appealed. The remaining facts appear in the opinion of the court.

Henry Davies, for the plaintiff.

George Adee, for the defendants.

Present—BALCOM, BOARDMAN, PARKER and MURRAY, JJ.

By the Court—BALCOM, P. J. The judgment rendered by Hathaway, as a justice of the peace, in favor of Forman, against Tupper, for twelve dollars and ninety-three cents, was not void, although the constable who served the summons in the suit appeared as attorney for the plaintiff on the return day, and presented the note on which the judgment was rendered, and proved the execution of the note as a witness. (See *Wilkinson v. Vorce*, 41 Barbour, 370.) It was erroneous, and it could have been reversed on appeal. (See 2 R. S., 233, § 44; Laws of 1864, p. 1006, chap. 421; *Ford v. Smith*, 11 Wend., 73; *Miles v. Pulver*, 3 Denio, 84.) But as it was only irregular, the execution issued on it was valid by virtue of which the defendant, Smith, levied on the cow in question and sold her, or Tupper's interest in her, and title to her. (See *Wilkinson v. Vorce*, *supra*.)

Hathaway's docket of such judgment was received in evidence without objection; and it will be presumed, if the objections now raised against the validity of the judgment had been taken on the trial, the summons would have been produced. It was not necessary to the validity of the judgment, that the docket should show the place where the summons was returnable, or the place where the justice called the parties; and the plaintiff appeared by Smith as attorney, and the judgment was rendered. (2 R. S., 268, § 243, subdivisions 2 and 3.) And I am of the opinion the evidence

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showed that the judgment was sufficient to uphold the execution issued on it.

The evidence established that the plaintiff was the owner of the cow on the 31st day of May, 1867, when the defendant, Smith (as constable), levied on her, by virtue of the execution issued to him by Hathaway, on the above mentioned judgment which he had rendered in favor of Forman against Tupper, on the 29th day of August, 1864. The cow was then in the possession of Tupper. The plaintiff had said to him, he could keep the cow and pay for the use of her, and when he saw the way of paying for her, he (plaintiff) would sell her to him. But that arrangement did not transfer to Tupper a leviabie interest in the cow ; for the reason that the plaintiff had the right to take her from him at any time. Chief Justice SAVAGE, in *Otis v. Wood* (3 Wend., 498), reviewed several cases, and then said: "The principle of these cases is, that a person in possession of a chattel, having a right to such possession for a specific time, has an interest which may be sold." The fact that Tupper had the possession of the cow, and leave from the plaintiff to keep her *an indefinite time*, on paying the plaintiff for the use of her, and also had been told by the plaintiff he would sell her to him when he (Tupper) saw the way of paying for her, were insufficient to give him (Tupper) a leviabie interest in the cow. (See 2 Cowen, 543; *Strong v. Taylor*, 2 Hill, 326; 4 Denio, 327; *Herring v. Hoppock*, 15 N. Y. Reps., 409.) It is clear that the hirer of a chattel must have the right to the possession of the same for some specific time to give him a leviabie interest in it.

The cow remained in the possession of Tupper until she was sold by the defendant, Smith, as constable, by virtue of the execution issued to him by Hathaway ; which sale was made on the 23d day of September, 1867.

The plaintiff sold the cow to Tupper on the 8th day of July, 1867 ; and the plaintiff had no title to or interest in her against Forman's execution subsequent to that date, unless

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he acquired title to her by purchasing her from Tupper a day or two before Smith sold her, as above stated.

Smith posted notices that he would sell the cow, by virtue of the Hathaway execution, on the 29th day of July, 1867. But he did not sell the cow on that day; which day, as I compute the time, was not within sixty days from the date of the execution. Hathaway renewed the execution for the full amount on the 27th day of July, 1867; which time was within sixty days from the date of the execution.

It does not appear that Smith saw the cow, or made any memorandum respecting her on the execution, between the time he levied the execution on her on the 31st day of May, 1867, and the 23d day of September next thereafter when he sold her.

Executions issued by justices of the peace, "shall be returnable sixty days from the date of the same." (Code, § 64, sub., 12.) It is provided by chapter 512 of the laws of 1857 (Laws of 1857, vol. 2, p. 87): "If any execution issued by a justice of the peace upon a judgment rendered by him, be not satisfied, it may from time to time be renewed by said justice, by an indorsement thereon to that effect, signed by him, and dated when the same shall be made. If any part of such execution has been satisfied, the indorsement of renewal shall express the sum due on the execution. Every such indorsement shall be deemed to renew the execution in full force, in all respects, for sixty days from the date thereof." This statute was necessary in consequence of the change made by the Code respecting the time executions shall be returnable. (See 2 R. S., 251 and 252, § 145.)

It was decided in *Chapman v. Fuller* (7 Barb., 70), that "an execution, issued by a justice of the peace, may be renewed on the last day it has to run, so as to retain the lien thereof upon property levied on by the constable, sufficient to satisfy the execution, and which he has on hand, for want of bidders."

According to the principle of that decision, the levy Smith made on the cow on the 31st day of May, 1867, was kept

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good by the renewal of the execution on the 27th day of July thereafter, until he sold the cow on the 23d day of September in the same year.

It clearly was in the power of Tupper to purchase the cow of the plaintiff on the 8th day of July, 1867; so the levy on her would be good as against him, and enable the officer (Smith) to hold her against any subsequent purchaser from Tupper. And I am of the opinion the sale of the cow by Smith (as constable) was rightful, and as valid as it would have been if he had made a new levy, in fact, on the cow, by virtue of the execution, after Tupper purchased her of the plaintiff, and before the latter bought her back of the former. And no one can doubt, if such a new levy had been made, that the sale of the cow on the 23d day of September would have been lawful and valid.

The evidence shows that the levy of the execution, on the 31st day of May, was on the cow, and not a special levy upon the mere right of Tupper to her possession and use. It was a levy of which he could not complain. But it would have been of no benefit to the plaintiff in the execution (Forman) if Tupper had not subsequently purchased the cow of the plaintiff.

The plaintiff knew the cow had been levied on when he bought her back of Tupper, and of course took her back subject to such levy. (See 11 Wendell, 548, *infra*.)

If the plaintiff had not sold the cow to Tupper, after Smith levied on her, he would have had a right of action against Smith for levying on her. But none against the defendant Adee, who did not do anything to render himself liable for such levy.

When the plaintiff sold the cow to Tupper he parted with the right of action he then had for the alleged wrongful taking and conversion of her by Smith. (See *McKee v. Judd*, 2 Kernan, 622.) And as Tupper must be deemed to have purchased the cow for the benefit of his creditors, as well as himself, it was out of his power to retransfer to the plaintiff the right of action the latter had previously had for the levy

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on the cow by Smith, for the reason that the right of action could not be retransferred by Tupper to the plaintiff without a resale of the cow by the former to the latter, which could not be done in consequence of the levy being on the cow as against Tupper. (See *Butler v. Maynard*, 11 Wend., 548.)

The execution bound the property of Tupper during all the time from its delivery to Smith until he sold the cow. And when Tupper purchased the cow, the levy on her continued as against him within the principle of the decision in *Roth v. Wells* (41 Barbour, 194; S. C. 29, N. Y. Reps., 471.) When the plaintiff subsequently purchased the cow, he knew she had been levied on, and therefore was not a purchaser in good faith. He did not take possession of the cow, and knowledge by him that the execution was in the hands of the constable prevented him being a purchaser in good faith. (2 Wait's Law and Practice, 721 to 724.) The constable having levied on the cow on the 31st day of May, he was at least constructively in possession of her when Tupper purchased her on the 8th day of July, and also thereafter until he sold her. I base this conclusion upon the principle of the decision in *Birdseye v. Ray* (4 Hill, 158; S. C., 5 Denio, 619), where it was held that where a sheriff levied upon a growing crop owned by the judgment debtor and another, he was constructively in possession of the whole; so that when the debtor afterward, and before the return of the execution, acquired his co-tenant's share the sheriff rightfully sold the whole upon his original levy.

The summons in this action was issued and delivered to the person deputed to serve it, on the morning of the 23d day of September, before the cow was sold by Smith, by the direction of the defendant, Adce, on that day. The person who was deputed by the justice to serve the summons retained possession of the summons until after he bid off the cow, and he then served it on the defendants. The person who was authorized to serve the summons is to be deemed a constable for all purposes in the action. (See *Wilkinson v. Force*, *supra*.) And the suit was commenced at the time the sum-

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mons was delivered to be served, to the person whom the justice had authorized to serve it. (2 R. S., 227, § 12, sub. 2; *Cornell v. Moulton*, 3 Denio, 12.) It follows that the plaintiff could not recover for the sale of the cow, for the reason that the action was commenced before the sale was made.

If the foregoing conclusions are correct, the County Court erred in refusing to nonsuit the plaintiff and in the charge to the jury, and the judgment of that court should be reversed and a new trial granted in the action in that court, costs to abide the event.

New trial granted.

NATHANIEL S. BARNETT and others, Appellants, v. DEBORAH KINCAID and others, Respondents.

(GENERAL TERM, THIRD DISTRICT, MARCH, 1870.)

The claims set forth in an executor's petition for authority to sell, mortgage or lease his testator's real estate (2 R. S., 102, § 1, &c.), were in the aggregate \$4,314; upon the hearing the executor admitted funds in hand to the amount of \$1,332, and formal proof was given of liabilities of the estate to the extent of \$1,723; the surrogate, without hearing further proof, directed the sale of a farm valued at \$6,200.—*Held*, on appeal, that the order should be affirmed.

Held, further, that the surrogate might refuse upon the hearing to hear testimony offered for the purpose of establishing a disputed claim.

Quere.—Whether the surrogate may direct the leasing of land, on such an application, where all the parties interested in the real estate are adults.

APPEAL from a decree of the surrogate of Rensselaer county.

Barnett and Percy, as administrators of John Barnett, deceased, presented a petition to the surrogate of Rensselaer county praying for authority to mortgage, lease or sell a portion of the real estate left by their intestate, for the payment of his debts. The petition and schedule annexed stated claims amounting to \$4,314.26 as the liabilities against

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the estate. No answer to the petition was filed, and no written objections were interposed to any of the claims set forth in the petition. The proper parties having been brought before the surrogate, the administrators admitted the personal property in their hands to be \$1,332, and various claims were proved in the aggregate for \$1,723.40. It appeared that there were disputed claims unadjudicated against the estate in favor of the appellants to the amount of \$1,900 and the counsel for the claimant offered to establish them; but the surrogate did not entertain the offer, and no proof was made of the other claims set forth in the petition.

The real estate of the deceased consisted of a lot of land worth \$1,500, and a wood lot worth \$100, and a farm of some, 286 acres, divided into two tracts of 161 acres, with a house, and 124 acres respectively. The value of the latter tract was shown, under fair circumstances, to be about fifty dollars per acre, or \$6,200. The first tract was mortgaged for \$3,400 and two years' interest on the mortgage was unpaid. There was a ground rent on the whole farm. The surrogate determined that there were valid debts larger in amount than the personal property in the hands of the administrators; and being satisfied that there were other large claims against the estate, suspended any further hearing, and ordered a sale of the 124 acre tract. From this order, the widow and two of the heirs appealed.

Robert H. McClellan, for the appellants.

C. E. Patterson and *H. Peck*, for the respondents.

Present—HOGEBOM, PECKHAM and MILLER, JJ.

By the Court—MILLER, J. The principal question which arises upon this appeal relates to the decision of the surrogate directing a sale of the real estate of the intestate. It is contended by the appellant's counsel that it was error to order a sale of 124 acres of land, to pay debts established at

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\$1,723.40, when the administrators had on hand the sum of \$1,332.

The foregoing amount of \$1,723.40, was adjudged to be the amount of valid debts as justly due and owing upon the application before the surrogate; but it appears, from the schedule annexed to the petition, that claims had been presented, amounting in all to \$4,314.26. There was also a claim of Sarah M. Barnett, of some \$600, which was disputed and not passed upon by the surrogate. If all of these claims are properly to be considered by the surrogate it would leave a large excess of debts over and above the personal estate, besides the commissions and expenses of administration, and the costs of the proceedings to sell the real estate.

Before the surrogate can make an order for the mortgaging, leasing or sale of real property, he must be satisfied of the existence of debts, and that the personal estate is insufficient for their payment. (2 R. S., 102, § 14.) I think that it is not essential that the debts should all be proved at the first hearing; for it is provided that upon the distribution of the proceeds of sale, that any other debts or demands which shall be presented, and which were not established upon the original application for a sale, shall be proved to the satisfaction of the surrogate; and the same proceedings may be had to ascertain the same, as prescribed upon the hearing upon the application for authority to sell. (2 R. S., 107, § 42.) It would, therefore, seem that the surrogate was authorized to take into consideration, not only the debts allowed, but such others as were presented, and would probably be finally established as lawful demands against the estate in determining the question, whether it was most advantageous to mortgage, lease, or sell the real estate. If it appear that a sufficient sum can be raised advantageously, then he is to direct a mortgage or lease to be made. (2 R. S., 102, § 15.) If the moneys required cannot be thus raised advantageously to the estate, then a sale is to be had. (See 103, § 18.) He is to determine from all the facts and circumstances, according to his best judgment, which course

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will be most advantageous for the estate ; and unless it is manifest, that he has abused the discretion conferred upon him, I think his decision is not the subject of review. It is not denied that either a mortgage, lease, or sale was necessary for the payment of the debts of the intestate ; and it is quite evident that if the debts, beyond those which were allowed, are to be taken into consideration, that a lease or mortgage would not furnish the amount required as well as a sale. To pay the debts allowed, and those which were presented, over and above the amount on hand of personal property (\$1,332), between \$3,000 and \$4,000 would be required. The farm was mortgaged for \$3,400, subject to a ground rent. The interest on the mortgage had not been paid for two years, and the mortgage had been left with an attorney for collection. According to the evidence, the farm would rent for \$1,000 to \$1,400 per annum, and out of this must be paid the annual value of the widow's dower, the annual interest on the first mortgage, as well as the new one, besides taxes and necessary repairs. It may be added, that all the heirs but two, besides the widow, concur in the propriety of a sale. Upon the facts presented before the surrogate, it is apparent that there were strong reasons for the conclusion at which he arrived, that a sale would be most advantageous to the parties, and I discover no sufficient reason for disturbing his adjudication. It may also be remarked, that as all the parties in interest were adults, it is quite questionable, whether the surrogate had authority to authorize a lease for a term of years. (2 R. S., 103, § 16.)

I think that the surrogate committed no error in excluding the testimony offered by Sarah M. Barnett in support of her claim, to be given by one of the heirs-at-law as to a conversation between the deceased and the claimant. It is a sufficient answer to the offer made, that the evidence related to a disputed claim which was contested, and the validity of which it is not ordinarily within the scope of the duties of a surrogate's court to try and adjudicate upon. (*Tucker v. Tucker*, 4 Keyes, 136.) The object of the proceeding is to ascertain

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whether there are *bona fide* claims against the estate sufficient to exhaust the personal estate; and the surrogate is to examine the allegations, and proofs of the executors or administrators applying, and of all persons interested in the estate who shall think proper to oppose the application. (2 R. S., 101, § 8.) While the heirs or devisees may contest the validity and legality of any debts, demands or claims which may be represented as existing against the testator or intestate (2 R. S., 101, § 14), there is no authority at this stage of the proceeding for allowing a contest which would be more appropriate before another tribunal. In the exercise of a sound discretion, at least, the surrogate had a right to determine after sufficient appeared to indicate that a sale was necessary, that the order should not be delayed to await the termination of the litigation. The parties presenting a claim which is disputed might well be left to pursue their remedy in some other court where the controversy could more properly be determined; and if the claim is not thus established an opportunity will be furnished upon the distribution for that purpose. (2 R. S., 107, § 41.)

The same remarks are applicable to the refusal of the surrogate to hear further evidence as to the claim of Sarah Barnett and Nathaniel S. Barnett.

As to the claim of Volney Richmond, which was allowed by the surrogate, I think there was sufficient evidence to warrant its allowance.

As there was not error in the proceedings, the decree for a sale should be affirmed with costs to the respondents, to be paid out of the estate.

Decree affirmed.

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MAX SALINGER v. EDWARD SIMMONS and others.

(GENERAL TERM, THIRD DISTRICT, MARCH, 1870.)

The defendants as common carriers, received merchandise for transportation from the plaintiff, addressed to a consignee at W., which they carried to C., the terminus of their route, and delivered to an irresponsible warehouseman, a common agent in that respect, for several other carriers, and for themselves; from the premises of the warehouseman it was taken by a teamster, such being ordinarily the means of transportation between C. and W., and left, in the absence of the consignee, on his premises, with notice to, and in the presence of a member of his family; the consignee afterward refused to receive it, and notified the teamster thereof, who returned it to the warehouse of C., without notice of any kind to the warehouseman, where it was lost, and the plaintiff brought a suit to recover its value.—*Held*, that he was properly nonsuited.

There was a delivery to the consignee, and thereupon the defendants' contract was performed, and they could not therefore be held liable for previous negligence in delivering at C. to an irresponsible warehouseman; nor could the return of the merchandise to the defendants' agent, without notice as to which of his principals it was intended for, revive their liability.

THIS action was brought to recover the value of a cask of liquor, shipped for the plaintiff by the defendants, who were common carriers, from New York city, and consigned to one Sherman at East Windham, N. Y., and which had been lost after delivery into the defendants' possession.

The case was tried at a circuit in Greene county, before Mr. Justice PECKHAM and a jury, and the plaintiff proved a shipment of the cask on the defendants' boat, consigned to Sherman, as stated, at East Windham, a place distant some twenty miles inland from Catskill on the Hudson river; that Catskill was the northern terminus of the defendants' route, with reference to East Windham, and that the goods were safely delivered there into the charge of one Huntley, who carried on the business of a warehouseman and tavern-keeper under the same roof, and who acted as agent for the defendants, and of several other steamboat proprietors at that place. Huntley put the cask into his warehouse, subject to the call

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or order of the consignee, according to his custom in such cases, and a few days after one Newman, a teamster, whose business it was to carry goods, took the cask, without the consignee's order, upon his wagon, carried it to East Windham, and there disposed of it, as stated, with other facts in the opinion of the court.

The court nonsuited the plaintiff, who duly excepted, and the case and exceptions were ordered to be heard in the first instance at General Term.

James B. Olney, for the plaintiff.

Charles D. Ingersoll, for the defendants.

Present—INGALLS, HOGEBOM and MILLER, JJ.

By the Court—MILLER, J. The evidence in this case establishes that the property in question was safely transported upon the defendants' steamboat to Catskill Point, which was the termination of the defendants' route as common carriers, and was there delivered to one Huntley, who kept a public house, and a storehouse or warehouse at that place, and who acted as the agent of the defendants and of other steamboats in receiving and delivering freight. The defendants had no interest in the storehouse or warehouse; and the usual custom was to put all goods there which were landed at the Point for the consignees, and subject to their call or order. There was no regular line of transportation between Catskill and East Windham, where the goods were to be forwarded; and a teamster, either on his own motion or otherwise, it does not exactly appear how, without any order or direction of the consignee, took the cask and carried it to the residence of the consignee, to whom it was directed, and delivered it there in front of his house and place of business in the presence of two of his sons, he being absent, and notified one of them that the cask was for his father. Subsequently the consignee refused to receive the property, alleging as the

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reason that he had never ordered it; and by his direction and at his request, the teamster brought it back and delivered it at the place from whence it was taken, to some person who was there; but the agent, Huntly, testifies that he did not know, and it does not appear that he did know that it was there. It disappeared and was lost.

The plaintiff's claim to recover in this action, is based upon the ground that the defendants were guilty of negligence; and unless this is made to appear, the action is not maintainable. I think the property was lawfully delivered at its place of destination at Catskill Point, the end of the defendants' route, and properly left at the store, or warehouse, which was a suitable place for its deposit, for the benefit and on account of the consignee. Up to this period of time, there was no act done by the defendants, which indicates negligence, and exposed the property to injury or loss. The deposit at the store, or warehouse, appears to have been in accordance with a well settled rule of law. When the consignee is absent at the place of destination, the carrier may discharge himself from further liability, by placing the goods in store with some responsible third person, at the place of delivery, for, and on account of the owner. (See *Northrop v. Syracuse R. R. Co.*, 5 Abb. N. S., 428; *Williams v. Holland*, 22 How., 137.)

In the case at bar, the goods were left with the agent, who was in the habit of receiving property; and had they been lost while there, and before they were removed, the fact that the agent was irresponsible, may, perhaps, have been urged as evidence of negligence, and have been entitled to consideration in determining the question of the defendants' liability. But as the goods were safely kept, and forwarded to the consignee by the earliest and most convenient mode of transportation, and as they were not lost at this time, I am inclined to think, that no question of negligence arises in the case. If there had been a regular line of transportation between Catskill Point and East Windham, the delivery of the goods to the next carrier on the route, with proper instructions,

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would have terminated the defendants' liability. (*Hempstead v. N. Y. C. R. R. Co.*, 28 Barb., 485; *McDonald v. W. R. R. Corporation*, 34 N. Y., 497.) As there was no such line, nor any other convenient means of transportation, and as the one selected was entirely safe, there was no impropriety or negligence in thus forwarding the property to the consignee. It was one way of notifying him of the arrival of the goods. That it was entirely safe, is apparent from the fact that the property was safely delivered to the control of the consignee, so far as was practicable. That it was not accepted, was not the fault of the defendants, but of the plaintiff, or the consignee. For the misunderstanding between them, which caused a return of the goods and their loss, the defendants clearly are not liable. Nor, in my opinion, are they responsible, because the consignee directed the property to be sent back to Catskill, and because it was brought back by his order. I think that the duty of the defendants terminated certainly after the goods were delivered at the place of business of the consignee, if not before; and their liability cannot be renewed and resuscitated by a return of them to the storehouse, or warehouse of Huntley. If the consignee ordered the goods, then he is liable upon their delivery, and he cannot shift his responsibility by directing their return. If he did not purchase them, then the plaintiff was in fault in forwarding them to his direction, and has no good reason to complain of the defendants, because the consignee returned them.

There was no authority from the defendants, direct or implied, to return the goods to Catskill Point, and to make the defendants liable, at least notice should have been given that they were returned, and were to be taken back by the defendants in their steamboat for the plaintiff.

Huntley, the agent, was not aware of their being returned, and no directions were given as to what they were left for, or what was to be done with the property. Huntley was the agent for three different steamboats; and unless he was advised that the property was intended for the defendants, I

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do not understand how they can be held liable for his acts. If it be said, that he should have notified the owner, the answer is, that the evidence does not show that he had notice of the delivery for the defendants, and hence they are not liable. Huntley, being the proprietor of the house where the goods were placed in store, became thereby the agent or bailee of the owner. (*Fisk v. Newton*, 1 Denio, 45.) In establishing the liability of a common carrier, it must not be overlooked that there must be an acceptance of the goods, and that the responsibility does not commence until the delivery is complete. It is not enough that the property is delivered upon the premises, unless the delivery is accompanied by notice to the proper persons. (*Grosvenor v. The N. Y. C. R. R. Co.*, 39 N. Y., 34, and authorities there cited.) The defendants were exonerated from liability after the goods were delivered to the consignee, and no steps were taken to bring them within the rule laid down in the case last cited, after they were thus discharged.

In no aspect in which the case can be considered, can the defendants be held liable; and the judge upon the trial, in my opinion, committed no error in his rulings, and properly directed a nonsuit. A new trial must be denied with costs.

New trial denied.

RICHARD R. CLARK, Plaintiff in Error, v. THE PEOPLE, &c.,
Defendants in Error.

(GENERAL TERM, THIRD DISTRICT, MAY, 1869.)

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Where an indictment for obtaining property under false pretences, charged that the prisoner, with an intent to defraud one A. G., Jr., did "falsely pretend and represent to the said A. G., Jr., for the purpose of inducing the said A. G., Jr., to part with a yoke of oxen of the goods and chattels of the said A. G., Jr., that," &c., "by which said false pretences he," the prisoner "then did unlawfully obtain from the said A. G., Jr.," the oxen mentioned,—*Held*, that there was a substantial averment that the prisoner had obtained the property from the prosecutor by means of the false pre

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tences made, and the latter's belief therein, and that the indictment was not defective in that particular.

The case of *The State v. Philbrick* (31 Maine 401), commented upon and on this point disapproved.

Where it is charged in the indictment that the prisoner obtained the property upon the security of his promissory note through false and fraudulent representations as to his ability to pay the same, an averment of his neglect to make payment of the note is not essential.

ERROR from the Sullivan County Sessions.

The prisoner was indicted for obtaining property under false pretences, and tried at a Court of Sessions held in the said county on the 16th day of November, 1868, and found guilty. The indictment charged that the prisoner, on the 28th day of May, 1867, at the town of Liberty in said county, "unlawfully, knowingly, and designedly did, with the intent to cheat and defraud one Abel Gregory, Jr., then and there being, falsely pretend and represent to the said Abel Gregory, Jr., for the purpose of inducing the said Abel Gregory to part with a yoke of oxen, of the goods and chattels of the said Abel Gregory, Jr., that he, the said Richard R. Clark, owned a farm, situated in the town of Fallsburgh, in said county of Sullivan, and a good stock of cattle thereon; that there were no incumbrances thereon; that he did not owe to exceed the sum of fifty dollars, and that he had large sums of money due him from responsible parties; by which said false pretences, he, the said Richard R. Clark, then did unlawfully obtain from the said Abel Gregory, Jr., one yoke of oxen, of the goods and chattels of the said Abel Gregory, Jr., of the value of \$200, and gave him the said Abel Gregory, his promissory note therefor, due one day after date, with intent to defraud, and him, the said Abel Gregory, thereby did defraud out of his said oxen. Whereas in truth, and in fact, the said Richard R. Clark did not own a farm in the said town of Fallsburgh; that said farm and stock were not free from incumbrances; that he did owe more than fifty dollars, and that he had no debts due him, as he, the said Richard R. Clark, did then so falsely pretend and represent to the said Abel Gregory; and the said Richard R. Clark, at the

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time he so falsely represented and pretended, as aforesaid, well knew the said pretences to be false, against the form of the statute in such case made and provided, and against the peace of the people of the State of New York and their dignity.

Upon the prisoner being found guilty his counsel moved the court to arrest the judgment, for the reason that the indictment on which the prisoner had been tried and convicted did not contain sufficient allegations and averments to constitute a crime; the court decided that the indictment was sufficient, denied the motion, and sentenced the prisoner to pay a fine of \$400, and stand committed until said fine was paid. A writ of error was then sued out by the prisoner.

A. C. Niven, for the plaintiff in error.

Benjamin Reynolds, district attorney, for the defendants in error.

Present—MILLER, INGALLS and PECKHAM, JJ.

By the Court—MILLER, P. J. It is a rule of law, well settled, that in an indictment all the ingredients of the offence with which the defendant is charged, the facts, circumstances and intent constituting it, must be set forth with certainty and precision, without any repugnancy or inconsistency, and the defendant must be charged directly and positively with having committed the crime. (Ar. Cr. Pl., 25.) This principle, which is applicable to criminal pleading, dates back to the earliest history of the criminal law, and has not been relaxed by the adoption of the Code of Procedure, by which more liberal rules of pleading are sanctioned in civil cases.

It is also held that in indictments for obtaining property under false pretences the charge must be explicit enough to support itself, and that the indictment must relate an intelligible story. It is not enough to state that the defendant, by a certain false pretence, effected the fraud; but the pretence, with all the material facts and circumstances appertaining to

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the transaction, must be averred with due certainty. (*People v. Gates*, 13 Wend., 311, 322.) The gist of the offence in such cases consists in procuring the goods of another by false pretences with the intent to cheat and defraud. (*The People v. Kendall*, 25 Wend., 401.) It must be made to appear, with sufficient certainty by the indictment itself, that the owner of the property relied upon the false representations, and was induced by means thereof to part with his property. (*The People v. Herrick*, 13 Wend., 88; *The People v. Skiff*, 2 Park. Cr. Rep., 140.)

It is insisted by the counsel for the plaintiff in error that the indictment against him does not conform to the standard laid down in the authorities cited, and that it is defective and insufficient in not alleging that the prosecutor, Gregory, was induced to part with his property by reason of the false pretences stated, or that he believed the statements made by the plaintiff in error; and, acting under that belief, he parted with his property, or anything equivalent to such an averment. The indictment avers the intent, the inducement, the false pretences, and then charges that by said false pretences the prisoner did unlawfully obtain the oxen and gave his note therefor with the intent to defraud, and did thereby defraud the prosecutor. It also charges that the pretences were false, and that the prisoner knew them to be false. It will be observed that there is no positive and direct averment that the pretences alleged had any influence upon the mind of the prosecutor or induced him in any way to part with the oxen; and it would no doubt have been more strictly in accordance with the rules of pleading applicable to such cases, to have inserted an allegation embodying a charge of the character stated. It is however averred that by the false pretences alleged, the prisoner did obtain the property. This could not be true, in fact, unless the prosecutor believed the false pretences set forth to be true, and they had an influence upon his mind and induced him to part with the property. How could the prisoner obtain the oxen in the manner alleged, unless it was done by means of the false pretences operating upon his

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mind and influencing his judgment? The allegation that the prisoner made the representation for the purpose named, in connection with the subsequent averment that he did thus obtain the oxen, is equivalent to a statement that he believed the pretences to be true, and was induced thereby to part with the property. First is the inducement, and then follows the act of obtaining the oxen; the latter as a natural and inevitable consequence of the former. The fair and legitimate construction of the last allegation will warrant the inference, that inasmuch as the prosecutor was induced to part with the oxen that he believed the statements made, and thereby the oxen were unlawfully obtained.

I think that the plain and obvious meaning of the phraseology employed, is that the prisoner for the purpose of inducing Gregory to part with the oxen, made false representations which were believed by Gregory, by means of which, he was induced to deliver them. It cannot be supposed from the statement made, that he parted with the oxen for any other reason, nor that force, or any other consideration but the representations made, produced the result which followed.

It may be added that the indictment is drawn in conformity with precedents generally recognized. (Whart. Cr. L., 239; Ar. Cr. Pldg., 4th G. & B. Ed., 275,) and although in some of the reported cases, the indictment contains an averment that the prosecutor believed the false pretences, and was induced thereby to deliver the property, yet, in none of them was any question of this character raised. (13 Wend., 111; 4 Barb., 151; 2 Park. Cr. R., 140.)

In *The State v. Philbrick* (31 Maine, 401), it was held that the indictment is defective, unless it set forth that the false pretences were made with a view to effect the sale or exchange of property, and that, by reason thereof, the party was induced to part with his property. This case is directly in point, and sustains the position taken by the counsel for the plaintiff in error.

The opinion of the court does not discuss very much at length the principle involved, and I think the conclusion

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arrived at is not based upon any sound reason. *The Commonwealth v. Strain* (10 Metc., 521), is cited as authority for the same doctrine; but in that case there is no allegation in the indictment that the representations were made in order to induce the prosecutor to part with his property, and the case was decided upon other grounds.

It is undoubtedly the rule in civil cases that in an action for deceit or fraud in the sale of property induced or procured by the false representations, that the complaint must aver that the false representations were made with an intent to induce the purchaser to make the purchase or trade in question, and that they did induce such sale; but it is enough if there is anything in substance which amounts to an allegation of this character. (*Barber v. Morgan*, 51 Barb., 133.) Not less should be required in indictments for false pretences. But I think when the indictment charges that the pretences were made for the purpose of inducing the party to part with his property, and that by such pretences the property was obtained, it is a substantial compliance with the rule referred to. Upon such an allegation the people would be compelled to prove that the party defrauded was deceived by the pretences, and of course he believed them, and if they failed to do so the prisoner could not be convicted.

I think it is not necessary that the indictment should aver that the prisoner did not pay the note. The allegation that the property was fraudulently obtained, shows that the crime was consummated, and payment of the note, after this, would not blot out the offence or atone for its commission. It was not material, therefore, to allege that the note was not paid.

As there was no error in denying the motion in arrest of judgment, the conviction must be affirmed and the sentence enforced.

Conviction affirmed

Howe v. Lloyd.

ELIZA HOWE, Appellant, v. MARGARET LLOYD, Executrix of
ALEXANDER C. LLOYD, Respondent.

(GENERAL TERM, THIRD DISTRICT, MARCH, 1870.)

Costs are not taxable against executors or administrators, as of course, where judgment is recovered against them as defendants in an action.

It seems, they are only granted in such case, pursuant to section 41 (2 R. S., 90), by order upon motion.

The plaintiff, on a referee's report, in his favor, in an action against the defendant as executrix, entered judgment for damages and costs; the defendant appealed from the entire judgment, and then the plaintiff readjusted the costs upon notice, and the defendant moved, at Special Term, and obtained an order setting aside the judgment as irregular; on appeal from the order, the court directed the costs to be stricken from the judgment, without prejudice to a motion by the plaintiff for costs, and the order was otherwise affirmed without costs.

The entry of judgment for costs in such a case, is not an irregularity waivable by an appeal.

And it seems the appeal, being prior to the adjustment, could have no effect as a waiver upon the proceedings therefor. Nor would the court consider, upon the appeal from the order, the plaintiff's right to have costs under the statute.

APPEAL from an order of Mr. Justice HOGEBOM, made at a Special Term, setting aside a judgment entered upon the report of a referee for damages, \$524.97, and costs \$150.69, against the defendant as executrix.

The plaintiff taxed his costs, and entered judgment October 23d, 1869, and the defendant appealed from the judgment on the 29th of the same month, and on the 30th, after due notice, the plaintiff retaxed his costs. On the 17th December, 1869, notice of motion was given by the attorney for the defendant, for the Special Term in that month, to set aside the entire judgment, on the ground that the plaintiff was not entitled to costs, and that they had not been allowed to him on motion.

It appeared that the claim upon which the suit was brought had been formally presented to the executrix before commencement thereof, and that after suit, the executrix had

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formally offered to allow judgment against her for \$300, and costs.

The motion to set aside the judgment being granted, the plaintiff took this appeal.

N. C. Moak, for the appellant.

W. S. Paddock, for the respondent.

Present—INGALLS, PECKHAM and MILLER, JJ.

By the Court—MILLER, J. The plaintiff in this action claims that costs are recoverable as a matter of course against an executor or administrator, to be levied of the assets of the deceased. I think that this position cannot be maintained.

The Code, § 317, declares, "that in an action prosecuted or defended by an executor or administrator," &c., "costs shall be recovered as in an action by and against a person prosecuting in his own right." * * "But this section shall not be construed to allow costs against executors and administrators where they are now exempted therefrom by section 41." (2 R. S., 90.) This section of the Code is general in its character and alone might be construed to establish a rule which places all representative parties upon the same footing as to costs as those parties who are acting for themselves, except that it compels the estate to pay the costs, unless the court direct that they be paid by the executor or administrator personally, for mismanagement or bad faith in the action or defence. It must be considered, however, in connection with section 41 of the Revised Statutes, which restricts its application only to cases where an executor or administrator is a plaintiff and fails to recover in the action.

This provision declares that, "no costs shall be recovered against the defendants; nor shall any costs be recovered in any suit at law against any executors or administrators to be levied of their property, or of the property of the deceased, unless it appears that the demand upon which the action was brought was presented," &c., "and that its payment was

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unreasonably resisted or neglected, or that the defendant refused to refer the same," &c. The plain and manifest interpretation of the provision of the Revised Statutes cited, is, that in cases where the action is against the defendants as executors or administrators, no costs can be recovered unless it be by order of the court. Such cases are expressly excepted from the provisions of section 317 of the Code. The Code was not intended to provide merely a formal exemption to the executor or administrator from liability for costs, and to hold the estate liable in all cases, but to leave the Revised Statutes in full force where an action was brought against an executor or administrator. This construction has been generally followed by the courts in such cases, and I think is sustained by abundant authority. The defendant in a suit brought by an executor or administrator, is entitled to costs without a motion when a successful defence is interposed. (*Woodruff v. Cook*, 14 How., 481; *Curtis v. Dutton*, 4 Sand., 719.) But where actions are brought against an executor or administrator, and a judgment obtained, no costs can be recovered unless the court, in the exercise of its powers, upon motion, adjudge that it is a case in which costs should be paid under the statute referred to, by the estate or its representatives. (*Fox v. Fox*, 22 How., 453; *Mersereau v. Ryerss*, 12 How., 300.) The case cited by the plaintiff's counsel (9 Bosw., 696), which holds that the estate is chargeable in cases where the plaintiff is successful in a suit against the representative, is a Special Term decision, in conflict with the cases cited, and I think does not present a correct interpretation of the provisions of the Code and of the Revised Statutes, which have been referred to. In any respect in which the question may be considered, I am of the opinion that costs cannot be recovered in an action against an executor or administrator except upon the application by motion to and the order of the court.

It is insisted by the plaintiff's counsel that the defendant, having appealed from the judgment after it was legally perfected, could not move to set it aside for irregularity. I incline to think that the taxation of the costs, without the

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authority of the court and their insertion in the judgment roll, was rather more than a technical irregularity. It was not a mere formal error, but the adjustment and allowance of an amount of money not authorized by law, and a substantial defect in the judgment, which, if it did not render the judgment void, should entitle the party to some relief. (1 Burr. Pr., 474.) The rule that irregularities may be waived by an appeal, has never been applied to a case like this, and the authorities cited to sustain the doctrine contended for are cases of technical and formal defects which do not affect or impair the validity of the entire judgment or proceeding. (*Cotes v. Smith*, 29 How., 331; *Mayor v. Lyon*, 1 Daly, 300; *Clumpha v. Whiting*, 10 Abb., 448; *Kellogg v. Baker*, 15 Abb., 288; *D'Ivernois v. Leavitt*, 8 Abb., 60; *Vail v. Remsen*, 7 Paige, 206; *Brady v. Donnelly*, 1 N. Y., 126.)

But even if this motion may be regarded as founded upon an irregularity alone, inasmuch as the costs were not readjusted until after the appeal had been taken, I am inclined to think that the appeal would not affect the subsequent proceeding upon the readjustment.

It may also be added that courts indulge great liberality in disregarding mere technical irregularities when they interfere with the promotion of justice, and parties are frequently allowed to come in, after being irregular, upon terms, and present their case. In this case the Special Term made it a condition of allowing the defendant to make a motion to vacate the judgment that he pay the costs of opposing the motion, and thus inflicted a penalty for the alleged irregularity.

The fact that the defendant served an offer to allow judgment to be entered for a specific sum, is not such a recognition of liability for costs as to compel the payment of costs under any and all circumstances. The answer to the proposition is, that this offer was refused, and hence both parties occupy precisely the same position as they did before it was made.

Nor is it proper to consider on this motion the question

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whether the plaintiff is entitled to costs by reason of an unreasonable resistance to the claim litigated. That is a matter which will more appropriately arise upon a motion for costs when both parties can be heard, and is not now before us.

I think that the Special Term committed no error in setting aside the whole judgment. The judgment was clearly erroneous in having costs inserted, and thus far the whole of it was properly vacated. The fact that it was thus erroneous in part, did not fairly entitle the plaintiff to costs of the appeal, and he probably would be entitled to interest and costs under the statute (S. L. of 1869, 1870), even if he should fail in obtaining an allowance of costs on motion. This provision is not material to the disposition of the questions arising on this motion, if I am correct in the views I have before expressed, and should not interfere with the affirmance of the order. I think that the order should be affirmed with costs.

PECKHAM and INGALLS, JJ., were in favor of affirming, except as to costs, and it was ordered accordingly, that judgment stand, except as to costs, &c., and that these should be stricken out of the judgment without prejudice to an application hereafter for costs, and that no costs be allowed to either party in this appeal.

Marsh v. Russell.

PELATIAH J. MARSH and ANDREW M. BATES, Respondents, v
WILLIAM A. RUSSELL and HUGH A. COWAN, Appellants.

(GENERAL TERM, THIRD DISTRICT, MARCH, 1870.)

In June, 1864, four persons, anticipating a government call for troops, agreed to divide the profits and share the losses of any contracts made by them individually or collectively, for furnishing the quota of recruits of one or more towns of a certain county, for a sum not less than \$500 per man, and that they or either of them, should make no agreement to furnish the quota of any town for a less sum than \$500 per man, without the assent of all.—*Held*, that the agreement was designed to restrain competition in procuring enlistments, and tended to increase the burdens of taxation and was void as against public policy, and that every part of the contract into which it had been incorporated was also void.

THIS was an appeal from a judgment in favor of the plaintiffs, entered upon the report of a referee, in an action brought to recover a share of alleged profits in the recruiting business, and for disbursements claimed to have been made in such business, by the plaintiffs, on the defendants' account.

It appeared that on the 18th June, 1864, the defendants who resided at Salem, in Washington county, made a contract with the plaintiffs who resided in Troy, and were there engaged together in the recruiting business, respecting the quotas of troops which it was supposed the government would require from the towns of Washington county. The contract was as follows, viz: "It is hereby understood and agreed by and between the undersigned, that if the undersigned, or either of them, shall make a contract with one or more towns in Washington county, N. Y., to fill the quota of such town or towns, under an anticipated call of the government, for a sum not less than five hundred dollars per man, that all gains or profits which may accrue in such business shall be divided equally, share and share alike, between the undersigned, and that all losses shall be paid equally by them. It is further understood and agreed, that

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the undersigned, or either of them, shall make no agreement to furnish the quota of any town for a less sum than five hundred dollars per man, without the consent of all the undersigned. That if two or more towns shall be contracted with to furnish their respective quotas for five hundred dollars per man, or more, by the undersigned, then, and in that case, it is hereby understood and agreed, that the undersigned shall furnish eighteen men, or whatever number the quota of the town of Hebron may be, at the rate of four hundred dollars per man.

“*June* 18, 1864.

“WM. A. RUSSELL.
H. R. COWAN.
A. M. BATES.
P. J. MARSH.”

After the execution of this contract, the call for troops was made, and the defendants, individually, or in connection with others, made various contracts with different towns of Washington county, this action was brought to recover moneys claimed to be due in respect thereof, under the agreement above set forth.

The referee reported that after deducting payments there was due the plaintiffs from the defendants including interest, \$4,692.65. Exceptions were taken to the report, judgment was entered, and the defendants appealed.

S. Hand, for the appellants.

Wm. A. Beach, for the respondents.

Present—HOGEBOM, PECKHAM and MILLER, JJ.

By the Court—MILLER, J. By the terms of the contract entered into between the plaintiffs and the defendants, it was agreed that if the parties, or either of them, made a contract with one or more towns in Washington county to fill the quotas of said town or towns, under an anticipated call of the

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government, for a sum not less than \$500 per man, all profits and losses in such business should be equally divided between them. It was also stipulated that the parties, or either of them, should make no agreement to furnish the quota of any town for less than \$500 a man without the consent of all of them.

It is insisted by the defendants' counsel that the stipulation set forth was void as against public policy. Here is a positive agreement between the parties to the instrument to keep up the price of procuring recruits, and the question arises whether such a contract is within the well known rule, that all combinations to keep up prices and prevent competition are illegal and of no effect. Had these parties a right thus to agree among themselves not to furnish recruits for a less sum than the one named in the written agreement? By the contract the parties had a right to furnish the men together or separately, and were to share the profits and losses. They had a common interest in the final profits or losses, but there was no such understanding as would constitute them a firm or copartnership engaged in the same general business. If all of them agreed with a third party, of course all would be liable; but if one only made a contract, the other parties who did not participate in it would not be bound by the acts of that one. Such being the relative position of the parties, it becomes important to consider the principle, which is applicable to a contract made under the circumstances presented in the case now to be determined.

In *Stanton v. Allen* (5 Den., 434), it was held, that an association among the whole or a large portion of the proprietors of boats, on the Erie and Oswego canals, under an agreement to regulate the price of freight and passage, by a uniform scale to be fixed by themselves, and to divide the profits of their business according to the number of boats employed by each, with provisions prohibiting the members from engaging in a similar business out of the association, is illegal, for the reason, that the tendency of such agreement is, to increase prices, to prevent wholesome competition and

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to diminish revenues and is therefore against the public policy and void by the principles of the common law. In the case cited, there were articles of association signed by the officers of separate lines of transportation on the canals, for the purpose of establishing fair and uniform rates of freight. Each of the parties was to put in as many boats, as they subscribed shares, to pay a certain amount, and after making certain deductions provided for, the balance, whether freight or loss, was to be divided and proportioned among the several parties according to their relative number of shares. The learned judge who wrote the opinion says: "The association being thus secured against internal defection and external encroachments, and the members having thrown their concerns into stock to derive an income in proportion to the number of shares they hold, and not according to their merit and activity in business, and safe against the reduction of compensation that would otherwise follow mean accommodations and want of skill and attention, the public interest must necessarily suffer grievous loss." These remarks are applicable to the case at bar. According to the agreement before us, it was of no consequence how many recruits each man obtained, or how much activity he exhibited in obtaining them, all were entitled to an equal division and share, and the public were to be burdened with the highest price by the combination. In reply to the position, that the association was a partnership, he remarks: "But whether it is of that character or not, is not material. No one can be deceived by any supposed analogy between the principle of uniformity of price among the members of an ordinary business firm and the same thing in a confederacy formed for no other purpose or use than to bring it about." With nothing to show a partnership, in the instrument under which the plaintiff's claim to recover, it is too apparent to admit of a question that the arrangement was a confederacy to prevent competition, and not the agreement between persons engaged in the same general business as copartners.

In *Hooker v. Vandewater* (4 Den., 349), the proprietors

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of five several lines of boats, engaged in the business of transporting persons and freights on the canals, entered into an agreement among themselves to run for the remainder of the season of navigation, at certain rates for freight and passage then agreed upon; but which were to be changed whenever the parties should deem it expedient, and to divide the net earnings among themselves, according to certain proportions fixed in the articles. In an action on the agreement against a party who had failed to make payment according to contract it was held, that the agreement was a conspiracy to commit an act injurious to trade, and illegal and void. JEWETT, J., says: "That the raising of the price of freight for the transportation of merchandise or passengers upon our canals, is a matter of public concern, and in which the public have a deep interest, does not admit of doubt. It is a familiar maxim, that competition is the life of trade. It follows, that whatever destroys or even relaxes competition in trade is injurious, if not fatal to it. (*The People v. Fisher*, 14 Wend., 9.) The object of the agreement as expressed in the written contract is plausible enough, but it is impossible to conceal the real intention." It is very evident, from the agreement in evidence, that the object and purpose of the contract, was to destroy competition in obtaining the enlistment of recruits for the army, and the case is analogous in many respects to those cited. The law has always regarded such contracts with signal disfavor, as affecting the character and value of property, and services rendered, injuriously, and as utterly void. It has also been held, in numerous cases, that all agreements between parties to prevent competition in bidding for property sold, are unlawful, and that no action lies for the consideration agreed to be given. (See *Wilbur v. How*, 8 Johns., 444; *Doolin v. Ward*, 6 Johns., 194; *Swan v. Chropenning*, 20 Cal., 182; *Gardner v. Morse*, 25 Maine, 140; *Gulick v. Ward*, 5 Halst., 87.)

The contract in question, was made at a period when recruits were required in large numbers for the army, and

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could only be obtained by the promise of large sums of money, by way of bounties, which could only be raised by the imposition of heavy taxes upon the people. The interest of every taxpayer, clearly, was to fill the quota of men required at the lowest amount, and by the least expenditure of money which could possibly answer the purpose. The effect, and manifest aim of the contract, was to produce directly a contrary result, and to increase the burdens of taxation upon those who eventually would be obliged to pay the expenditures required. It was intended, so far as these parties were concerned, to prevent the procuring of any recruits, for a less sum of money than \$500 a man, thus restraining competition in the business of furnishing men, and by combinations, to obtain the largest possible amount. It was a combination to increase taxation in the localities which were bound to furnish recruits, in opposition to the interests of the entire community. The agreement not to furnish for a less sum than \$500 was an important part, a vital and essential element of the contract, and contaminated and impaired the whole consideration. Being void in part, the illegality renders the whole agreement invalid and void. (See *Brown v. Brown*, 34 Barb., 533; *De Beerski v. Paige*, 47 Barb., 173; 36 N. Y., 537.)

The fact that the agreement in question was only entered into by four persons does not, in my opinion, militate against its being considered as against public policy and void, for if this number can thus combine and confederate to increase taxation and impose additional burdens upon the people, then it may also be done by any larger number who may be engaged in the same unlawful object and purpose. It is not the number which stamps the agreement as illegal and void, but the nature and character of it; the purpose for which it was designed, and the object in view, the raising of the price of recruits. It is this illegal and improper purpose which affects the whole contract and renders it invalid and void. The contract being unlawful, the action cannot be maintained, and the decision of the referee was erroneous.

Simmons v. Cloonan.

As a new trial must be granted for the reasons stated, which strike at the very foundation of the plaintiff's action, it is not necessary to examine and consider the other questions raised.

HOGEBOM, J., concurred.

New trial granted

EDWARD SIMMONS, et al., Respondents v. THOMAS CLOONAN
AND THE TRUSTEES OF THE VILLAGE OF RONDOUT, Appellants.

(GENERAL TERM, THIRD DISTRICT, MARCH, 1870.)

In 1849, the owners of certain agricultural lands built an embankment thereon as a highway, and also to dam a stream running through the premises, and thereby create a reservoir to supply water by means of a culvert under the embankment, to a mill further down the course of the stream, occupied under them by one B. In March, 1850, the owners conveyed to B. the mill premises with the privilege of using "the reservoir dam," and in June, of the same year, contracted with him to sell and convey, with possession until conveyance, other premises lying along the bank between the mill site and the down stream side of the culvert. B. took possession of, and in 1852 built a new mill on the premises described in the contract, which he operated with the said owner's knowledge by water supplied from the reservoir through the culvert by means of a wooden flume therefrom, and soon after abandoned the use of the old mill. In 1853, while the new mill was so in operation, the said owners conveyed the premises described in their contract with B., together "with the appurtenances," to his assignee, with covenants of warranty. and in 1867 they conveyed the land covered by the reservoir to the defendant, C.—*Held*, that a right to use the waters from the reservoir passed by the grant to B.'s assignee, and C. was perpetually restrained, in a suit against him and the commissioners of highways, brought by one having title through such assignee, from destroying the reservoir, or diminishing the supply of water, or interfering with its flow upon the plaintiff's premises.

Nor could C. claim on appeal in such suit, authority from the commissioners of highways to interfere with the plaintiffs' rights in the reservoir, he having interposed as a defence a personal right, no separate motion having been made for nonsuit, &c., at the trial, on behalf of the commissioners, and no evidence having been given of steps taken by the commissioners, as such, respecting such interference.

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THIS action was brought by the plaintiffs to prevent by injunction the destruction of a water privilege attached to their mill. The mill site was purchased by the agreement and conveyance mentioned in the referee's report, hereinafter set forth, for the sum of \$500, and, with the improvements made after the purchase, and the water privileges, was worth \$12,000. The cause was tried before a referee who found the following facts, viz :

"Previous to 1848 or 1849, Jansen Hasbrouck and Gabriel W. Ludlum, under a trust deed from Abraham Hasbrouck, were the owners of the land on both sides of the treet in the village of Rondout, called Hasbrouck avenue, as the same is now located, for nearly its entire length, including the premises on which the plaintiffs' mill now stands, and the premises of the defendant, Cloonan, where the pond or reservoir now is.

"For the purpose of bringing the property into market for village lots, in 1849 or 1850, they took measures to have Hasbrouck avenue laid out, and employed Elihu Brown to construct it. Before this the land was used for agricultural purposes.

"They had only two objects in view in the construction of Hasbrouck avenue ; it was constructed as a road (thus bringing the property into market for village lots as aforesaid) and also for the purpose (being the only other object) of making a reservoir for the old mill property at the corner of Hasbrouck avenue and Mill street, on which what is called 'the old mill,' being the 'mill lower down the stream' hereinafter mention, and had been standing for many years ; and said reservoir was used solely for the purpose of supplying the old mill with water until Brown abandoned such mill as hereinafter stated. No agreement was ever made with Brown that the reservoir might be used for any other purpose, and there was no agreement with Brown by which the new mill (the plaintiffs' mill), was to be substituted for the old mill in respect of the water privileges enjoyed by the old mill.

"In constructing the roadway of Hasbrouck avenue an

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embankment was raised across a natural stream of water, flowing through the premises upon which the plaintiffs' mill has since been erected, and a pond or reservoir was formed on the opposite side of the street. A culvert was constructed across Hasbrouck avenue beneath the surface of the street from this reservoir or pond to the opposite side of the street, so that the water could be used for a mill lower down the stream, which was then owned by Jansen Hasbrouck and occupied by Brown as a lime and grist mill under a contract from Hasbrouck.

"The culvert is built of wood and is about thirty feet in length, ten feet deep, and six or eight feet wide; over it is a bridge, also of wood.

"The plaintiffs take the water from the culvert at its termination on the southerly side of Hasbrouck avenue, and lead it by a wooden raceway to their mill. The raceway is about two feet wide and eighteen inches high.

"On the 1st of June, 1850, Jansen Hasbrouck, having become the owner of the property on Hasbrouck avenue, which had belonged to him with Ludlum, as trustees, entered into a written contract with the said Elihu Brown to sell and convey to him the premises described in the complaint, and Brown entered into the possession thereof; and in 1851 or 1852 built the mill now owned by the plaintiffs and commenced operating it as a lime mill by water, using the water from the reservoir that had been formed by the construction of Hasbrouck avenue. Brown, shortly after he commenced operating this mill, abandoned the old mill lower down the stream.

"On the 1st day of July, 1853, Jansen Hasbrouck, at Brown's request, conveyed the premises agreed to be sold to Brown as above stated, to Joseph S. Smith, to whom Brown had assigned the contracts. This conveyance contains covenants of warranty and conveys the premises as described in the contract, 'with the appurtenances.'

"At that time the mill was in operation, and using the water from the reservoir through the culvert constructed across Has-

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brouck avenue under the surface of the street, as the same now is. Hasbrouck was then the owner of the land on the opposite side of the street, including the reservoir.

“The plaintiff, Simmons, subsequently acquired the legal title to the lot in question, and entered into copartnership with the plaintiff, Gross, for the manufacture of lime in said mill, using the water from the pond or reservoir for such purpose. The plaintiffs were so engaged as copartners at the time of the commencement of this suit.

“The premises, with the right enjoyed of using the water from the reservoir, are worth about \$12,000; if deprived of that right, their value would be greatly lessened.

“On the 1st of March, 1850, Jansen Hasbrouck conveyed to Elihu Brown the ‘old mill’ and lot, in which conveyance the privilege to use ‘the reservoir dam’ is granted for the purposes of the old mill. The old mill was burned down in 1854, and the site has not since been used for a mill. The pond has been filled up and there is now no pond connecting with it except the reservoir pond above, formed by the construction of Hasbrouck avenue.

“On the 13th of November, 1867, Jansen Hasbrouck conveyed with covenants of warranty, to the defendant, Thomas Cloonan, the land covered by the pond or reservoir. Shortly after his purchase Cloonan went to the plaintiff, Gross, and informed him of his purchase, and told him he should not use the water from the pond. Gross told Cloonan that he must not interfere with the water rights of the plaintiffs or fill up the pond; and if he did, that the plaintiffs would assert their rights to the use of the water by law. Afterward, on the 23d or 24th of January, 1868, Cloonan came with men and hoisted the gate of the dam and let off the water. He commenced filling up the pond along side of the gate with dirt and rubbish and stones, and set men working on the south side of the street on the plaintiffs’ premises, under the flume or culvert, removing heavy stones which had been placed there to prevent the washing out of the earth, &c. Cloonan also stated to Gross that he had been

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employed by the trustees of the village of Rondout to build a sewer there.

"The trustees of the village of Rondout are a corporation duly organized under the laws of this State, and had made an agreement with Cloonan to repair the sewer at the point spoken of."

The referee also found the following conclusions of law:

"1st. That by the deed from Jansen Hasbrouck to Joseph S. Smith, whose title the plaintiffs hold to the premises described in the complaint, the right to use the water from the reservoir passed to the grantee as appurtenant to the grant, and still belongs to it.

"2d. That the plaintiffs are entitled to an injunction perpetually restraining the defendants from destroying the reservoir, or doing any act that will materially diminish the supply of water, or that will interfere with the flow thereof upon the plaintiffs' premises.

"3d. That the plaintiffs are entitled to their costs of this action against the defendants."

The defendants, separately, duly excepted to the decisions of the referee. A case was settled, judgment was entered upon the referee's report, and the defendants appealed to this court.

Lawton & Stebbins, for the appellants.

William Lounsbury, for the respondents.

Present—HOGEBOM, PECKHAM and MILLER, JJ.

By the Court—MILLER, J. By the contract entered into between Hasbrouck and Brown, the former agreed to convey to the latter the premises described in the complaint. Brown entered into the possession under the agreement, built a mill, which he operated, using the water which had been provided by Hasbrouck by the construction of Hasbrouck avenue; and after this was done the deed was executed to Brown's assignee.

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This conveyance merged all prior cotemporaneous agreements which had been made, and it is evident that Brown bought the premises intending to use them for milling purposes, and that Hasbrouck knew of the purposes for which they were designed and had been used. The deed conveyed the premises, together "with the appurtenances;" and although no water privilege is particularly mentioned, yet I think, in view of the surrounding facts and circumstances, the conveyance must be construed to include all such privileges in regard to the water as naturally and necessarily were connected with the premises. Brown also owned the old mill, lower down the stream, for the purpose of supplying which in part the reservoir had been constructed and was used until he abandoned it; and although Brown knew, at the time of making the contract, that the reservoir was used for the old mill and the water privileges were to cease and revert to Hasbrouck if not used, in my opinion that fact does not deprive the plaintiffs of the rights and privileges which the deed may fairly be construed to convey; nor of the inference to be drawn from it, that it conveyed everything which related to or in any way affected the value of the premises, I do not think that it can fairly be claimed that the water rights which arose from the reservoir itself, which might be otherwise available for the purposes of the new mill, were confined alone to the old mill, and that the abandonment or discontinuance of the latter would cut off and prevent the use of the water which flowed from this source for the benefit of the stream. This clearly was one of the benefits existing at the time which followed the conveyance of the property and passed with the title of the land itself. The principle is well settled, that in such cases a deed from the owner conveys all the benefits which belong to the property as between that which is conveyed and property which is retained. The doctrine is fully discussed in *Lampman v. Milks* (21 N. Y., 505), and it is said in the learned and able opinion of SELDEN, J.: "That where the owner of tenements sells one of them, or the owner of an entire estate sells a portion, the purchaser

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takes the tenement or portion sold with all the benefits and burdens which appear at the time of sale to belong to it as between it and the property which the vendor retains." At the time when the deed of the premises in question was executed the reservoir was in existence, and the water from it had been taken from the culvert, which had been erected by Hasbrouck, and used by the plaintiffs for their mill; and it must be considered, I think, as a one of the benefits which belonged to, and which was to be derived from the sale, as between the property sold and that which remained.

The learned judge, in the same case, also says: "The parties are presumed to contract in reference to the condition of the property at the time of the sale, and neither has a right, by altering arrangements then openly existing, to change materially the relative value of the respective parts." The fact that the reservoir, and the water arising from it, had been used for the benefit of the plaintiff's mill, are presumed to have been taken into consideration at the time of the sale, and if these are to be disregarded and overlooked, it is apparent that the value of the property would be seriously affected, and the vendee deprived of one of the most important and essential elements of value to real estate of this character. The reservoir was in existence at the time the contract of sale was entered into between the parties, and the mill site would be of no account without the water privilege attached to it. The case cited, covers entirely the principle involved in the one at bar, and I think, is decisive. It is enough, I think, that the water privilege was the principal element which constituted the value of the property, and that the mill was built, and the water used, when the conveyance was made by Hasbrouck to Smith. This conveyance was a sale of all the privileges and benefits existing at the time, which were known to the grantor.

I think that there is no force in the position, that the assignee of the contract was the equitable owner, and that Hasbrouck only had a lien for the unpaid portion of the purchase money. The title did not become perfect until the

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conveyance, and had it been intended to convey the premises with reservations, they should have been specified. Evidently, the grantor had knowledge of the large expenditure made for improvements, and of the rights which had been enjoyed from the reservoir unrestricted; and he is not in a position to assert, that his deed did not convey all that would naturally belong to the premises.

It is urged, that the trustees of the village of Rondout were acting in pursuance of a special statutory power, to construct or repair the sewer, and also in discharge of an absolute duty, as commissioners of highways of the village, and that Cloonan is protected under such power and duty. Cloonan in his answer, alleges title, and claims under that title. He sets up a right to fill up the pond, so far as the same covers his land, and to appropriate the land to his own use. He stated his intention to one of the plaintiffs, to build a sewer to carry off the water from the pond, and to fill it up for lots, thus stopping the use of the mill, and greatly impairing its value. These declarations evince, that he did not claim to defend himself, under the authority of the trustees of the village, and are binding upon him.

As to the trustees, it does not appear that a separate motion was made on their behalf for a nonsuit, nor any claim to disconnect themselves from the acts of Cloonan. Nor was there any evidence to establish that a sewer was required for the use of the village or that any legal steps had been taken for the construction of it, nor that the act done was authorized as commissioners of highways.

I have examined the objections made to the admission of evidence, and I think that none of them are well taken. They do not require discussion.

There was no error upon the trial before the referee, and the judgment must be affirmed with costs.

Judgment affirmed.

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JOHN RINEHART, Appellant, v. SMITH YOUNG, Respondent.

(GENERAL TERM, THIRD DISTRICT, MARCH, 1870.)

The omission of an overseer of highways, to deliver to the town clerk a list of the inhabitants in his road district liable to work on the highways, as provided by section 21 of the statute respecting assessments for highway labor (1 R. S., 506), does not, it seems, avoid the assessment, made against persons so liable, by the commissioners of highways, &c.

It seems, the provision of the statute, in this particular, is merely directory. It seems that the "new inhabitants," whose names "shall, from time to time, be added to the several lists, &c." (§ 26, *id.*), are new inhabitants, not of the road district, but of the town.

And that in respect to all his land situate in the town, each inhabitant thereof is to be assessed for highway labor, in the particular road district in which he has his residence.

But it seems, if one who owns land in the same town with his residence, but in a different road district, moves his residence to the land without having been assessed in respect thereof for highway labor, his name may be added to the list under section 26 as a name "left out," and he rated accordingly.

The overseer of highways for road district No. 1, of the town of S., neglected to deliver the list required by section 21, to the town clerk of that town, and the commissioners of highways, at the proper time, prepared a list for the district from the list used in previous years, and placed upon it the name of the plaintiff who resided in road district No. 9, of the same town, but owned land in the former district. This list they delivered to the defendant as overseer of highways for district No. 1, who, when the plaintiff had soon after moved his residence to his land in district No. 1, assessed him for highway labor in respect of such land, and notified him to perform it, which he did in part, refusing to perform the balance; whereupon complaint was made by the overseer under the statute (§ 41) to a justice of the peace, the plaintiff was summoned, a fine imposed, and warrant issued for collection thereof (§§ 42, 43), under which his property was levied on and sold.—*Held*, that the plaintiff could not dispute the validity of the assessment in an action to recover the value of the property sold.

Beach v. Furman (9 John. R., 229), distinguished.

Quere, whether the overseer of highways, in making the assessment, did not act judicially.

APPEAL by the plaintiff from a judgment entered at the circuit against him for costs, in an action to recover for a

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wagon taken and sold for a fine imposed for not working on the highway.

One Lawyer was overseer of road district No. 1, of the town of Schoharie, in the year 1864. His road warrant was in a book containing the old lists of persons assessed for highway labor in said district for a series of years immediately prior thereto. This book was delivered to the town clerk of the town by Lawyer in the spring of 1865, and by the clerk was delivered to the commissioners of highways of the town, and it was before them at their meeting in 1865, when the road list in question was made out by the commissioners. To this list was attached a warrant signed by the commissioners, regular upon its face. And the book containing the list and warrant was afterward delivered to the defendant.

The plaintiff at this time resided on a farm in road district No. 9, in said town, which he had sold, and he was expected soon to move his residence therefrom to a place which he had bought in road district No. 1; and for this reason the commissioners put the plaintiff's name on the list, but did not assess him.

Afterward, and in May, 1865, the plaintiff moved his residence from road district No. 9 to his place so purchased in road district No. 1, and after the removal, the defendant, as overseer of highways for road district No. 1, ascertained the time for which the plaintiff ought to be assessed on account of the place to which he had moved, and rated him as others had been rated by the commissioners, and placed opposite his name on the list, under the column of "days assessed," the number "10."

After this assessment had been made, the defendant warned the plaintiff out to work. Plaintiff worked three days and then told the defendant that he would commute for the balance. He said that he would pay the commutation in a few days. And afterward the plaintiff sent the defendant a dollar, claiming that it was the full commutation, which the defendant did not accept. The defendant then warned him out twice. The plaintiff neglected and refused to appear,

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and the defendant proceeded against him, under the statute, to collect the fines imposed thereby.

The plaintiff was twice fined by the justice, but did not pay the fine. Warrants to collect the fines and costs were issued by the justice and delivered to a constable, who sold a wagon of the plaintiff under the same. For that sale this action was brought.

Judgment was rendered for defendant with costs, and the plaintiff appealed to this court.

N. P. Hinman, for the appellant.

H. Krum, for the respondent.

Present—INGALLS, PECKHAM and MILLER, JJ.

By the Court—PECKHAM, J. The legality of the proceedings before the justice, imposing the fines, is not questioned.

The plaintiff seeks to recover mainly on two grounds:

1. That the commissioners had no jurisdiction to make the list and issue the road warrant to the defendant, for the reason that the defendant did not "within sixteen days after his election or appointment, deliver to the town clerk a list, subscribed by him, of the names of all the inhabitants in his road district who are liable to work on the highways." (1 R. S., 506, § 21.)

2. That the overseer had no right to assess the plaintiff for the reason, 1st. That he had no legal list in his hands upon which to make the assessment; and, 2d. That the plaintiff was not "left out of such list, or a new inhabitant," within the meaning of the statute. (1 R. S., 507, § 26.)

The failure of the overseer to deliver a list to the town clerk, is the only ground upon which the action of the commissioners is questioned.

Is this provision of the statute, requiring the overseer to deliver the list to the town clerk, imperative or directory? If it be imperative, the commissioners had no authority to

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make an assessment, until they received such list from the town clerk; and their action in the premises would be void.

In my view, the statute is merely directory, although the point is not free from doubt. The act declares "that each of the overseers of highways shall deliver to the clerk of the town, within sixteen days after his election, or appointment, a list subscribed by such overseer, of the names of all the inhabitants in his road district, who are liable to work on the highways." (1 R. S., 507, § 21.)

Section 23 provides, that the town clerk shall deliver the lists filed by the overseers to the commissioners, "who shall proceed at their next meeting, or at some subsequent meeting, to ascertain, estimate and assess the highway labor to be performed in their town the then ensuing year."

Thus it would seem, that the act, in terms, contemplated that the commissioners should proceed to make the assessment after the delivery of the "lists" to them. But it does not prohibit them from proceeding, if the lists be not furnished.

Such lists are not furnished for any other purpose, than to indicate the persons "liable to work on the highways."

In making the assessment, the commissioners do not use the lists, except to affix to the name of each person named in it, the number of days which such person shall be assessed for highway labor. (§ 24, sub. 5.) Yet if any name of any person be left out of any such list, the overseer is authorized to assess him. (§ 26.) The whole number of days to be assessed in all by the commissioners, is determined not by such lists, but "by the number of taxable inhabitants in such town." (§ 24, sub., 1.) The number of taxable inhabitants may be ascertained by the tax list of assessments. Thus, the necessity for this list by the overseer to the clerk, would not seem to be absolute, except that it seems to be made the basis of the commissioners' action. But, I think, these provisions are merely as to the manner of making the assessment, rather than necessary to give jurisdiction to make it.

No important vital omission is made, but the directions of

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the statute, as to the manner of making the assessment, are not complied with. (*People v. Cook*, 14 Barb., 259, at pp. 290 to 294, and cases there cited; same case, 8 N. Y., 67, at p. 91.)

Then had the overseer, the defendant, a right to make the assessment against the plaintiff, either on the ground that he was a "new inhabitant," or that he was "left out of such list." I do not think he was a "new inhabitant," within the meaning of the statute, unless he had been a non-resident of the town, directly prior to moving into this road district, as the statute makes an inhabitant of a "town" assessable therein. He is to be assessed for all lands he may own therein, whether in the road district in which he resides, or in another. (1 R. S., 505, § 19; *id.*, 509, § 32.) The plaintiff could not, therefore, according to these provisions, be regarded as a new inhabitant, by moving from one road district to another in the same town. There seems to be no reason for such holding. But, in my judgment, he may be regarded as a person "left out of such list," when he moves from one road district into another, of the same town, and he owns land in the latter district, for which he had not been assessed in the other road district. That, I think, is this case. As to the farm lying in road district No. 1, his name was "left out of the list." He might have been assessed for that farm in the other district, where he formerly resided, but the facts show he was not. Persons assessed, residents of the town, cannot be compelled to work out of the road district where they reside, but by consent of the commissioners of highways, they may apply "the work assessed in respect to land" they have in another district, in the district where the same is situated.

It may be urged that one can scarcely be said to be "left out," when he could not legally have been put in; as plaintiff certainly could not be in district No. 1 prior to his moving into it; and yet, after he left district No. 9, it was too late to assess him there. If not assessed in No. 1, he would entirely escape. It is proper under such circumstances to give a liberal interpre

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tation to the words "left out." To hold that the plaintiff may in this case be regarded as "left out," I think, best subserves the purpose of the statute. It is within its spirit, if it cannot be claimed to be within its letter. The objection that no such "list" had ever been filed or delivered to the defendant, overseer, and therefore no name could be "left out" of that, has already been considered, in holding that the assessment made out by the commissioners, although never first delivered to the clerk by the overseer was in substance the list; sufficiently so for this purpose.

I do not think that any error is shown in the making of the assessment by the overseer, the defendant.

It is insisted on the part of the defendant, that the fines imposed upon the plaintiff by the justice on the complaint of the defendant, are a bar to this action. That they were judgments rendered substantially between the same parties as to the same matters in controversy here. Hence, that the question is *res adjudicata*. And there is great force in the position.

It is no objection to this judgment that it was rendered in a summary proceeding. It is equally conclusive. (*Demarest v. Darg*, 32 N. Y., 281.)

Nor, is it legally true, that the matter tried in this suit could not have been legally tried in those suits. If this assessment in this district, No. 1 were void, it was a perfect answer to the complaint before the justice, for a fine for not doing the work by the plaintiff. It is true this court held in *Beach v. Furman* (9 J. R., 229), that the justice could not "inquire into the legality of the assessment, but was bound by the act forthwith to issue his warrant of distress;" and the court say further in that case and in the cases there cited, that "the justice acted ministerially." But the statute under which the court made that decision was materially different from the act in force when these fines were imposed. (2 R. L., 272, § 9.) Now the justice first issues a summons requiring the delinquent to appear forthwith, to show cause why he should not be fined according to law. (1 R. S., 510, § 42.) If upon the return of such summons, "no sufficient cause

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shall be shown to the contrary," the justice shall impose a fine, &c. (§ 43.) This provision is not in the old statute. Hence the court held the duty of the justice to be merely ministerial under that act. Here it is quite clear in my opinion, that the act of the justice in passing upon the sufficiency of the excuse, is not ministerial, but judicial. In other words he renders judgment in this as in any other case, but the complaint is made perhaps *prima facie* evidence of the delinquency.

There can be no doubt that if the defendant, the overseer, was without jurisdiction to make this assessment, and it was therefore void, it would have been a perfect defence before the justice to the imposition of a fine for not working on the highway. The plaintiff might have shown any defence before the justice to the imposition of a fine, that he could present in this case as a ground of action. In other words, a cause of action proved here would have been a good defence there. A mere error in the assessment where the overseer had jurisdiction, would not have been sufficient for either. (*Randall v. Smith*, 1 Den., 219.)

The parties were in substance the same. In fact, the case before the justice seems to have been in the name of the defendant as plaintiff. So it was in 9 J. R. and in 3 J. R.

But, whether in his name or not, it was conducted by him. He was in substance the plaintiff, and the defendant there had, or could have had the benefit of every defence to which he would have been entitled, if the plaintiff there had been in name the defendant here.

I think *res adjudicata* here a good defence. Again was not this a judicial act in the defendant in making this assessment? He had jurisdiction of the person of this plaintiff and of the land for which he was assessed. But I do not propose to discuss this point.

I think the judgment should be affirmed.

Judgment affirmed.

Dauchy v. Silliman.

EDWARD N. DAUCHY, Respondent, v. ROBERT F. SILLIMAN AND
OTHERS, Appellants.

(GENERAL TERM, THIRD DISTRICT, SEPTEMBER, 1869).

The decision of a referee will not be reversed on appeal, upon the ground that it is given against a preponderance of testimony as respects the number of witnesses, where the evidence is conflicting, and no fact clearly ascertained, controls the case.

- Where common carriers by water, under false and fraudulent representations, as to the character of their vessel, made a special contract, to carry goods at the shipper's risk, he insuring at the carriers expense; and the shipper failing to effect an insurance, because the vessel was not as represented, prohibited the carriers before the voyage began, from taking the goods, and they persisting, the goods were damaged on account of a collision on the way.—*Held*, that the shipper might treat the carriers as if they had undertaken to transport the goods without limitation of their liability, and sue, and recover from them, upon that theory.

THIS was an appeal by the defendants from a judgment entered on the report of a referee.

The action was against the defendants, as common carriers, for damage to a quantity of rye, shipped by the plaintiff, on their boat at Troy, in December, 1862, to be carried to New York.

The complaint averred that defendants, as common carriers, received the rye, under a special agreement to carry, at a specific charge for carriage, and an additional charge for extra towing; that the rye was carried, but was damaged by wet on the voyage. The answer admitted the occupation of the defendants, that they received the rye, and carried it, and that it was damaged; but alleged, that by the freighting agreement, the plaintiff was to assume all the risks of the voyage, the defendants being in no manner liable for the safe transportation of the rye; and that the plaintiff was to get the rye insured, defendants to pay the cost of the insurance.

It appeared that the voyage was late; that the river was obstructed by ice, and that at Albany, the defendants' boat ran against another boat lying in the river, causing a leak,

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which produced the damage. It was conceded that the defendants' boat was navigated in the ordinary way, and that proper care was taken of the cargo, after injury. And the referee found, that the defendants exercised proper skill and care, in the navigation of the boat, and in notifying the plaintiff of the loss, and in preserving her cargo. The contract for carriage, as alleged in the answer, was substantially proven, and the referee found that by it, "plaintiff was to take all the risks of the voyage, and that defendants were not to take any of the risks of the transportation." And also, that "plaintiff was to procure insurance upon the cargo, and defendants were to pay the premium therefor."

The plaintiff gave evidence to show, that at the time of the agreement, the defendants falsely represented, that the boat, by which the rye was to be carried, ranked as a second class boat, when in fact she was rated as one of the third class on the insurance register, made up in New York; that, therefore, the plaintiff could not obtain insurance upon the cargo; that on learning this, before the boat sailed, he notified the defendants, and forbade the transportation of the rye, and that the defendants, nevertheless, carried it to New York. Conflicting testimony was given on these issues. The referee found for the plaintiff.

Judgment passed against the defendants upon the theory, that their alleged false representation, as to the class of their boat, entitled the plaintiff to rescind the special contract, and forbid the transportation of rye; and that he did so, and defendants having wrongfully carried the rye, the plaintiff could treat them as common carriers thereof, and recover.

The defendants excepted to all the findings, upon which this theory was founded, and to the legal conclusions upon it.

W. A. Beach, for the appellants.

John B. Gale, for the respondents.

Present: —INGALLS, HOGEBOM and PECKHAM, JJ.

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By the Court—PECKHAM, J. I have carefully examined the evidence upon the questions of fact presented and urged by the appellants, and I am satisfied that this court should not interfere with the judgment upon either of such grounds. The contradictions are clear and absolute, and it was a proper case for the referee to decide as to the credibility of the witnesses. There is no conceded or clearly proved fact that controls the case. Upon some points the defendants have much the greater number of witnesses, but there is nothing in the testimony or facts that will allow this court to overrule the sound principle that witnesses "must be weighed, not counted;" and the referee who had the witnesses before him was better qualified than this court can be for that purpose. There is one important fact proved on the trial in reference to the contract, viz.: That defendant, Robert F. Silliman, telegraphed to New York for the insurance of this rye on the evening when the plaintiff alleges he had forbidden Silliman to carry the rye, and Silliman testified that he was requested to so telegraph. This the plaintiff positively denies. It will be remembered that by the contract as conceded by both parties the plaintiff was to get the rye insured at the defendants' expense. It is a very pertinent fact that Silliman telegraphed to have the rye insured when he did; but as I do not intend to discuss the facts at length, I will not pursue this further. There is much contradictory evidence whether plaintiff requested Silliman so to telegraph.

The only question as to which we entertain any doubt is whether the plaintiff can treat the defendants as common carriers, and sue them as such when they took the rye contrary to and in defiance of the plaintiff's orders. Under the circumstances, we think he can. According to the findings of the referee, the defendants agreed to carry the rye substantially at plaintiff's risk at a given price; the plaintiff agreeing to get the rye insured at the defendants' expense. This contract was based upon the representation of the defendants, that the boat on which it was to be carried was a second-class boat. In fact, she was found to be a third-class, within the meaning

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of the parties; thus materially affecting the contract and the safety of the rye. Thereupon the plaintiff, failing to get her insured, forbade the transportation. Yet the defendants proceeded, and the rye was on the voyage injured to the amount of the damages found for the plaintiff.

The defendants insisted upon conveying the rye. It is clear, under these facts as found, that the defendants could not claim the exemptions from peril provided by the original contract. By a material misrepresentation the defendants had authorized the plaintiff, the moment he discovered it, to terminate the contract, and forbid the carrying of the rye. He did so. If the defendants still insisted upon carrying the rye they did so, we think, at their own peril, and upon risks and responsibilities incident to their employment. The plaintiff very likely may have treated them as wrong-doers, and thus prosecuted them. But we see no objection to his treating them as common carriers without any qualification or modification of their liabilities under the contract which was avoided by their misrepresentation. It may well be that the contract was void even as to the price of transportation, as well as in other respects; no doubt it was, but no question as to that was raised at the trial, and none can therefore be presented here. I have carefully examined all the points presented by the appellants. I think no error was committed by the referee, and the judgment is affirmed.

Judgment affirmed.

Lansing.
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Lansing.
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162a 426

MARGARET LLOYD, Administratrix, &c., Respondent, v. JOHN
T. CARRIER, Appellant.

(GENERAL TERM, THIRD DISTRICT, DECEMBER, 1868.)

Where a member of a partnership firm advances money for its business beyond what is required of him by the copartnership agreement, he is entitled to interest on such advances.

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One of two copartners advanced moneys for the firm business in excess of the amount which he had agreed to furnish therefor, and charged interest thereon upon the firm books, which, after dissolution, the firm clerk, acting for such partner and in connection with the other partner examined, and no objection was made by the latter to the charge; statements of the accounts were also presented to the latter partner, including the charge for interest, and he then made no objection; in an action by the partner who had made the advances, for an accounting, the referee allowed the item of interest as upon an account stated.—*Held*, on appeal, that his decision should be sustained.

APPEAL from a judgment entered on the report of a referee.

Lloyd, the plaintiff's intestate, brought the action against Carrier, his former partner, after dissolution of their partnership, to recover a balance claimed on account thereof. Lloyd having deceased, *pendente lite*, the plaintiff was substituted as his administratrix. The referee found that the firm had been dissolved in May, 1861, and that Lloyd had previously advanced moneys for the prosecution of the firm business, for which he, through the firm clerk, had charged interest upon its books. That after the termination of the partnership, Carrier, in connection with such clerk, acting as Lloyd's agent, had examined and compared the firm accounts, and that Carrier had then made no objection to the charge for interest; that afterward statements of the accounts, including the charge for interest, were presented to Carrier and he did not object to such charge. Other facts are stated in the opinion of the court.

N. C. Moak, for the respondent.

S. F. Higgins, for the appellant.

Present—INGALLS, HOGEBROOM and PECKHAM, JJ.

By the Court—PECKHAM, J. The sole question in this case is as to the allowance of an item of interest charged by the intestate against the appellant upon moneys advanced by

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him to the firm during its existence, amounting to \$783.06. The action is brought for an accounting between parties as partners in the pork business. The contract of partnership was in writing, and provided, first, that Lloyd should furnish "pork barrels, salt, &c., necessary for conducting said business, and shall sell the pork in barrels, lard, &c., &c., and shall not receive any compensation for his personal services;" also that "Carrier shall be allowed for the use of said store, smoke-house, lard-house, all implements and tools, horse and wagon, harness, &c., \$300 for the season, or in like proportion should not the partnership be continued for the season."

Further, it was agreed that "Carrier shall give his personal attention to the business of packing and manufacturing, and shall not receive any compensation therefor, they being an offset to said Lloyd's services." This contract was dated September 15, 1860, and the business was substantially closed about the first of May, following, Lloyd in the meantime having advanced all the money for the business. The contract also provided that Carrier might draw out, not over ten dollars a week, to be charged to him; profits to be equally divided. Who should supply the money for the business, the contract did not declare, but it was provided that Lloyd should "place a clerk in the store, who should have the exclusive control of the books and moneys or evidences of debt, and who should deposit from day to day, with Lloyd, such cash or evidence of debt, and make such report as might be deemed proper.

There was no provision for the payment of interest on moneys to be advanced by either partner, nor any arrangement for the supply of capital for the business. So far as the case discloses, just and adequate provision was made for each party for everything, either was to supply to the firm. There was then no reason why one partner should supply money for the business capital, any more than the other. Under such circumstances, if the firm borrowed money from one of its members, or in other words, if one member advanced money to the firm for its business, is there any reason or equity why

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the firm should not pay interest on that loan in the same manner as if it had borrowed of any other person. I can see none.

The defendant insists that he had to give his personal attention to the "packing and manufacturing," and that Lloyd was to do very little. But, on the contrary, it is expressly provided that the defendant should have no compensation for these services, "they being an offset to Lloyd's services."

The accounts of the firm were kept by its clerk, H. Trowbridge. He was paid by the firm, and he, knowing all the facts, made this charge for interest. The charge, thus made, was in some degree the act of the firm. It was examined by Carrier. In fact, the law presumes as a general rule that he examined the firm books; it was examined with the clerk with a view to a settlement of the accounts, and no objection was made by him to this item.

The referee has found that the defendant agreed to the account as found by him, as correct. I think the evidence warrants the finding. The defendant himself when examined presented no inaccuracy, and never objected to this item of interest until advised thereto by his counsel. There was then an account stated, and no reason is shown for opening it. The defendant, knowing all the facts, recognised the justice of this claim for interest. Under all the facts, I think the law agrees with him.

I said the question of interest was the only question in the case; some others are made, but that was the point chiefly urged and relied upon. The others I have examined and am quite clear that they are without merit.

Judgment affirmed.

The People v. Carrington.

THE PEOPLE, &c., Plaintiffs in Error, v. FREDERICK CARRINGTON, Defendant in Error.

(GENERAL TERM, THIRD DISTRICT, SEPTEMBER, 1869.)

The return to a writ of certiorari brought from the determination of the canal appraisers under sections 16 and 17, of chap. 288, Laws 1840, presented no question of jurisdiction or of law as having been raised before or decided by the appraisers.—*Held*, that their determination should be affirmed.

The act contemplates the review of legal or constitutional questions only.
Per INGALLS, J.

THIS was a certiorari to review the proceedings of the canal appraisers in assessing the damages of the defendant, occasioned by the construction and improvement of the Oswego canal.

W. F. Allen, for the plaintiff in error.

J. H. Reynolds, for the defendant in error.

Present—INGALLS, HOGEBOM and PECKHAM, JJ.

By the Court—INGALLS, J. This proceeding is instituted by the canal commissioners under and by virtue of the statute entitled “An act respecting State stocks, the commissioners of the canal fund, and the canal board,” passed May 13th, 1840 (Session Laws, 1840, page 228), the sixteenth section of said act providing as follows:

§ 16. The commissioners of the canal fund or the canal commissioners may in their discretion cause a certiorari to be brought by the attorney-general, in behalf of the State, from the determination of the canal appraisers upon any legal or constitutional question to the Supreme Court in cases where any damages have been or shall be awarded upon any claim for the deprivation of any right or pretended right to the use of any water or water privileges or fisheries, or for the tempo-

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rary use or diversion of any water by the canal commissioners.

The seventeenth section provides, among other things, that the court "may set aside such appraisal for want of jurisdiction in the appraisers, or for any error committed in such determination, except as to the amount of damages awarded."

Upon the argument of this cause we were strongly impressed with the conviction that the return presented no question within the provisions of the statute which this court could properly consider, and subsequent examination has confirmed that conviction. We do not discover that any question of jurisdiction or of law was raised before, or decided by the appraisers. The evidence seems to have been taken substantially without objection, and no propositions appear to have been submitted for the determination of the appraisers. The question which was most discussed by the counsel for the plaintiff in error before this court is that the Oswego river was and is a public highway, and therefore the defendant's land extended only to the bank of the river, and not to the center, does not seem to have been raised before the appraisers. It is true there is evidence in regard to the character of the river, its capacity and the purpose for which it has been used, but it is left for this court to infer for what object such evidence was introduced, and what use if any, was made of it by the appraisers. The legal or jurisdictional question relied upon by the people should have been distinctly raised before the appraisers, and not left to inference. And they should have been incorporated into the proceedings and returned, so that if error had been committed which was the subject of review this court could correct it. We are not to infer that the appraisers have committed error, for if inferences are to be indulged they should be in support of and not against their determination. It is not the policy of the law to allow a party to participate in such a proceeding, omit to take proper objections or raise legal questions and seek redress by certiorari. The statute to which we have referred, provides that such certiorari is to be brought to review any legal or consti-

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tutional question, and the court is authorized to set aside the appraisal for want of jurisdiction in the appraisers, or for any error committed by them in such determination, except as to the amount of damages. It is very clear to my mind that the statute contemplates the review of legal or constitutional questions only, and that such questions shall be fairly raised and decided by the appraisers before a review can be had in this court. The evidence shows that the defendant did not rest his claim for damages upon one ground but several; and it does not distinctly appear, how much, nor whether any amount was allowed for land claimed by the defendant within the boundaries of the river. It cannot be insisted with propriety that the claim of the defendant is wholly unsupported by evidence, and the statute prohibits this court from reviewing the amount of such appraisal. It is reasonable to require a party to fairly apprise his adversary of the legal questions upon which he relies that he may have an opportunity to meet them; and such was obviously the intention of the legislature in framing the statute in question. We are therefore of opinion that the return presents no question which, under the statute referred to, we can review, and that the writ of certiorari should be quashed with costs, but without prejudice to any remedy which the plaintiff in error may deem proper to pursue.

PECKHAM, J., was in favor of affirmance, but not of quashing.

JAMES A. COLE, Plaintiff in Error, v. THE PEOPLE, &c.,
Defendants in Error.

(GENERAL TERM, FIFTH DISTRICT, OCTOBER, 1869.)

A witness called by the prosecution on the trial of a criminal action, upon a direct examination, gave material testimony against the prisoner, but a cross-examination was rendered impossible by reason of her sudden illness, and incapacity to testify further. — *Held*, the prisoner's counsel objecting, and claiming to have it stricken out, that it was error to submit the testimony so given to the jury.

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Where the right to cross-examine is lost without fault, or waiver by the party entitled, the testimony of the witness should be stricken out. Per MULLIN, J.

The case of *Forrest v. Kissam* (7 Hill, 463), distinguished, and some of the dicta therein disapproved.

ERROR to the Jefferson County Court of Sessions. The facts are stated in the opinion of the court.

W. F. Porter, for the plaintiff in error.

P. C. Williams, district attorney, for the defendant in error.

Present—FOSTER, MULLIN and MORGAN, JJ.

By the Court—MULLIN, J. The prisoner was indicted by a grand jury of Jefferson county, at a Court of Oyer and Terminer, held in and for said county, in June, 1868, for grand larceny. The property charged to have been stolen was a United States bond, of the value of \$500, with coupons thereto attached. The prisoner pleaded not guilty. The indictment was remitted to the Court of Sessions of the county, in which court the prisoner was tried upon the indictment, in September, 1869. He was found guilty of the offence, and sentenced to imprisonment in the State prison at Auburn, for the term of five years. The case is brought into this court by writ of error, sued out by the prisoner.

It appeared, on the trial, that one Seth O. Adams owned the bond in question. The prisoner was, at the time of the alleged larceny, engaged in the business of peddling sewing machines, and occasionally stopped at said Adams' house, and sometimes stayed over night. He knew Adams owned the bond, and where it was deposited. On the afternoon of the day of the taking, the prisoner was seen to open the drawer of the desk in which said bond was kept, in the absence of the members of Adams' family. In the evening of the same day Adams went to his barn to milk, leaving

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the prisoner in the house with Mrs. Adams, her children, and the hired girl. To prove what occurred after Adams left the house, Adams' wife was called, and testified that the prisoner told her, when alone with her in the house, in the dining room, that she must let him have the bond. She told him she could not; and he said he must have it; she told him to go and ask her husband for it; but the prisoner replied, that he (the husband) would not let him have it if he did, and he must have it; he said he did not want to do anything mean, but if she did not let him have it he would. She further testified, that the prisoner told her if she did not let him have it, he would tell her husband of the improper intimacy theretofore carried on between them; that she then went and got the bond, and laid it on the bureau, and the prisoner took it and carried it away with him. Before leaving, he told her how to leave the drawer in which the bond was kept, to make it appear that the bond was stolen, and she did as he directed, before going to sleep. The prisoner was called on for the bond by Adams, and he denied having it. The prisoner took with him a justice of the peace, in June, 1866, and went to the house of Adams. On arriving there, the prisoner requested the justice to remain outside till he went in, and told him that when he wanted him he would call him. In a short time the justice was called in, and a paper was handed to him signed by Mrs. A., which she was called upon by the prisoner to swear to, and to which after some hesitation, she did swear; and it was taken possession of by the prisoner. When the paper was handed to the justice, it was so folded as to show her signature only; and when inquired of by the justice, whether she understood the contents, the prisoner held the writing before her so that she might read it if she was so disposed.

By the affidavit thus sworn to, she declared that on the day said bond was taken from Adams' house she lent it to the prisoner, and that he was wrongfully accused of stealing it. This affidavit, Mrs. A. testified, was obtained from her by

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the assurance of the prisoner that it was the only thing that would save her.

On the close of her direct examination, Mrs. A., who had been under great nervous excitement during the time she was testifying, fainted away. She had convulsions during the night and was wholly incapable of being cross-examined on the next day. Indeed, her condition was such that it was considered dangerous to her life to attempt to examine her further in her physical and mental condition. There being no possibility of further examining her at that time, the prisoner's counsel insisting on his right to cross-examine the witness, requested the court to strike out the evidence of Mrs. A., given on direct examination, to postpone the trial to a future time, or that the prisoner be discharged from arrest on the indictment. All and each of which requests were refused. The court submitted the case on the whole evidence given on the part of the prosecution to the jury, who found the prisoner guilty of the crime charged in the indictment.

Other questions were raised on the trial; but as the refusal to strike out the evidence of Mrs. A. on the direct examination is fatal to the judgment, I have not considered any of them.

The importance and value of a cross-examination is truly and forcibly stated by Mr. Starkie in his work on evidence, vol. 1, page 25. He says: "The power given to a party against whom evidence is offered, of cross-examining the witness upon whose authority the evidence depends, constitutes a strong test both of the ability and willingness of the witness to declare the truth. By this means the opportunity which the witness had of ascertaining the fact to which he testifies, his ability to acquire the requisite knowledge, his powers of memory, his situation with respect to the parties, his motives, are all severally examined and scrutinized." Every person who has been engaged in the trial of causes in courts of justice, indeed every one who has given any attention to the trial of causes, has seen how efficacious a cross-examination is, in eliciting truth, in separating hearsay from knowledge, and in

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defeating the most carefully prepared schemes of perjury and fraud. A right so valuable to parties should not be taken away or impaired. On the contrary, it should be held sound and guarded against all attempts, open or covert, to limit or restrict it. Like most other rights of litigants, it may be waived or lost by laches. But to deprive a party of it, the waiver or the laches must be clearly shown. It will not do to refuse a party the right of cross-examination upon doubtful evidence of an intention on his part to waive or surrender it.

The prisoner's counsel not only did not waive his right to cross-examine Mrs. A., but he persistently insisted on his right, or failing in obtaining that, that then his client be discharged, a juror withdrawn, or the evidence given on the direct examination stricken out. The court refused to grant either request, and thus the evidence of Mrs. A. went to the jury in all its force, and unquestionably produced his conviction. Under such circumstances I think the court is bound to presume, that evidence material to the prisoner would have been obtained from the witness had his counsel been afforded the opportunity to cross-examine her. If I am right in this, the court below should have stricken out the evidence of Mrs. A., and instructed the jury to disregard it. In this way, and in this way only, could the rights of the prisoner be protected.

The evidence of Mrs. A. was doubtless retained on the case of *Forest v. Kissam*, in the Court of Errors (7 Hill, 463). But that case does not decide any principle that sustains this action of the court in this case. In that case the direct examination of the witness was closed, and then the referee adjourned the hearing till a future day, with the consent of the parties, and without any intimation from the party entitled to cross-examine the witness that he desired so to do. The witness died before the day to which the hearing was adjourned. The court held that the evidence of the witness was competent in the case as the other party had waived his right to cross-examine. The chancellor and senators, Bockes and Jones, seem to have been of opinion that the

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evidence was competent, and should have been acted upon by the referee in analogy to the practice in the Court of Chancery in similar cases. But all those voting for the reversal of the judgment of the Supreme Court were of the opinion that the party had waived his right to cross-examine, and hence the evidence was competent. It is said by the chancellor and senator Bockes: "That for the death of a witness or other visitation of providence rendering him incompetent to be cross-examined, the party calling him is not responsible. It is one of those calamities that must be borne by the party on whom it falls. And there is therefore no good and sufficient reason for holding the direct examination of such witness incomplete, and excluding it because incomplete." With great respect for the learning and ability of the eminent men who assert the competency of such evidence, I cannot agree with them.

It has been held that the right of cross-examination attaches the instant a witness is sworn, notwithstanding he may not have given a word of evidence. (1 Cowen and Hill Notes, 740.) While the rule may not be as broad as thus stated, yet it is doubtless the law, that if a witness is sworn and gives any evidence on the examination of the party calling him, the right to cross-examine as to anything pertinent to the issue attaches. (1 Greenleaf's Evidence, § 445 and Note 6.) This right cannot under ordinary circumstances be exercised until the direct examination is closed, at which time it becomes absolute; and the party calling the witness cannot by any act of his deprive the other of the right to cross-examine.

If the witness at the close of his direct examination should be taken sick so as to be incapable of examination, the further hearing would be postponed until the cross-examination could be had, and no one would claim that because of temporary illness the right to cross-examine would be lost and the evidence on direct examination admitted. If not, how long shall the hearing be postponed? Why does not such a providential visitation bind the party entitled to cross-examine the witness and deprive him of his right to do so? The answer

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is because the illness may be temporary merely, and when it has ended the right may be exercised. But suppose it is incurable insanity or deprivation of mind as by paralysis, rendering the witness utterly incapable of giving evidence, shall the court take evidence as to the condition of the witness, and if found incurable, receive the direct examination and ignore the right to cross-examine? Let us suppose again the party calling the witness kills him at the close of his direct examination for the very purpose of preventing his cross-examination, shall the court enter upon that investigation and admit or reject the evidence on direct examination as it shall find him guilty or not guilty of the murder?

In these and other cases which might be supposed, the party entitled to cross-examine is deprived of a most valuable right without fault or laches on his part, and in the case last supposed, by the act of the party calling the witness, while the wrong-doer would, if the evidence is received, be the gainer by his criminal act.

For these and other considerations which will readily occur to any person who examines the question, I am of the opinion that the only safe practice is to strike out the evidence on the direct examination in all cases when the opposite party has lost without his own fault, neglect, or consent, the opportunity for a cross-examination. If either party is to suffer by the death or incapacity of a witness to be cross-examined, it should be the one calling him.

I am therefore of the opinion that the evidence of Mrs. Adams, on direct examination, should have been stricken out, and for submitting to the jury the evidence on direct examination as competent upon the question of the prisoners guilt, in opposition to the objections of his counsel, the judgment of the Court of Sessions should be reversed and a new trial ordered, and record remitted to said court.

Judgment reversed.

Winslow v. Clark.

BRADLEY WINSLOW, Assignee of the Estate of NATHAN WHITING, a bankrupt, Appellant, v. WILLIAM CLARK.

(GENERAL TERM, FIFTH DISTRICT, JANUARY, 1870.)

W. gave to S. W., his father, a mortgage on land of \$2,000, as security to that extent, against a like mortgage of \$5,000, given by the latter for a loan to W., and having paid the greater part of the latter mortgage, and being insolvent, procured an assignment of the \$2,000 mortgage from S. W., to C., who knew of his insolvency, for the purpose of preferring a debt; within four months after the assignment, W.'s creditors filed a petition against him in bankruptcy; C. foreclosed, purchased at the sale, and conveyed to a *bona fide* purchaser for full consideration. In an action by W.'s assignee in bankruptcy, duly appointed (who had not been made a party to the foreclosure), against C., to recover the purchase money received by him from his grantee.—*Held*, that the assignment of the \$2,000 mortgage, as to such part of the amount secured thereby, as remained unpaid of the \$5,000 mortgage was valid, but that beyond such amount, the said assignment was void under the provisions of section thirty-five of the bankrupt law; and that the plaintiff might ratify the conveyance of C., and recover the purchase money which he received thereon, less such part of the \$2,000 mortgage, as was necessary to satisfy the balance unpaid on the principal mortgage.

The evidence showing, that no more than \$500 was due on the mortgage of \$5,000, and the appeal being from a judgment on a referee's report dismissing the complaint, the plaintiff was allowed to have judgment for the balance of the purchase money paid to the defendant, without costs, upon stipulating to allow a deduction of \$500 therefrom, otherwise the judgment to be affirmed with costs.

APPEAL from a judgment for the defendant, entered on the report of a referee, dismissing the plaintiff's complaint with costs.

The complaint demanded judgment, setting aside the assignment of a certain mortgage for \$2,000, made by the plaintiff's assignor in bankruptcy, and also setting aside a foreclosure, and sale of the mortgaged premises, obtained under the mortgage at the suit of an assignee thereof, said assignee having been the purchaser at the sale; or in case of conveyance by the assignee, that the plaintiff might recover the sum paid as the consideration for such convey-

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ance; and for an account of rents and profits, &c., and for other relief.

It appeared that the defendant, after his purchase at the foreclosure sale, had conveyed the premises to one Babcock for \$2,200. The facts appear in the opinion of the court. The case was submitted without oral argument.

Hammond & Winslow, for the appellants.

Hubbard & Wright, for the respondents.

Present—MULLIN, MORGAN and DOOLITTLE, JJ.

By the Court—MULLIN, P. J. By section 14 of the bankrupt law, it is provided that the assignment of the bankrupt's estate shall relate back to the commencement of the proceedings in bankruptcy, and vest in the assignee the title of the bankrupt to all his property and estate both real and personal, with certain exceptions not material to be considered in this case.

Nathan Whiting was adjudged a bankrupt on the 14th March, 1868. The plaintiff was appointed assignee on the 11th of May, 1868, and the assignment was made to him on the 20th of May. The day on which the proceedings in bankruptcy were commenced was not proved on the trial, but it is alleged in the complaint that they were commenced by the filing of the petition of the creditors on the 25th February, 1868, and it must have been about that time.

Plaintiff's title to the property in question in this suit, must be deemed to have become vested as of the last mentioned day. The title he thus acquired was that of the bankrupt, no more, no less. He therefore took it subject to all liens upon it that were valid against the bankrupt, unless such liens had been created by him within four months previous to filing the petition in order to give preference in fraud of the bankrupt act, or were created with some other fraudulent intent.

The defendant claims that at the time of filing the petition,

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he had a lien on the premises in controversy, by way of mortgage, for the sum of \$2,000, given by the bankrupt to Samuel D. Whiting, his father, payable in two years with interest. This mortgage was given to the father as security *pro tanto* toward a debt of \$5,000 due from the bankrupt to him. The latter raised the \$5,000 upon his own bond secured by a mortgage on his own farm. Payments were made by the bankrupt upon this \$5,000 mortgage from time to time, so that on or prior to the 31st December, 1867, it was either paid in full or so nearly paid that the mortgagee told the father that he would never be troubled as to that mortgage; that it would be all right as to him. The bankrupt was indebted to the defendant, and, for the purpose of preferring the payment of such debt, requested his father to transfer to the defendant the said \$2,000 mortgage; and he did so by assignment bearing date the 31st December, 1867. At the time of making this assignment and giving this preference the defendant knew that the bankrupt was insolvent. The debt from the bankrupt to his father seems to have been valid. He had therefore the right to hold and enforce the mortgage for \$2,000 for whatever sum remained unpaid on the debt of \$5,000. And a transfer of the \$2,000 mortgage to the defendant was undoubtedly valid to the extent of such unpaid indebtedness.

The mortgage being the property of Mr. Whiting, the elder, he had the right to assign to the defendant or any other creditor of his son, in payment or as security for his son's debt. Such a preference was not a preference given by the son but was that of the father for the son's benefit. The creditors of the son have no reason to complain of such a preference or payment. In the property transferred they had no manner of interest.

If the mortgage debt of \$5,000 was paid, the \$2,000 mortgage was also paid and ceased to be a lien on the premises covered by it. A mortgage once paid cannot be revived by a parol agreement of the parties, and continue as security for other demands to the prejudice of other creditors who subse-

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quently acquire liens on the premises covered by it. (*Mead v. York*, 6 N. Y., 449; *Truscott v. King*, id., 147; *Marvin v. Vedder*, 5 Cowen, 671; 1 Paige, 181.)

If a paid up mortgage cannot be revived or continued for a demand other than the one to secure which it was given by a parol agreement between the parties, it surely cannot be revived by such an agreement between a mortgagor and a third person not a party to the mortgage. The cases cited *supra*, and others might be referred to, hold a paid up mortgage attempted to be revived as a security for a new indebtedness void against subsequent *bona fide* purchasers and creditors by judgment or mortgage. The creditors of the bankrupt must, it seems to me, be held to be within the principle of the cases when the agreement to revive is made after the time to which the assignment of the property of the bankrupt relates.

The policy and object of the bankrupt law are to seize and appropriate the property of the bankrupt for the benefit of his creditors. The debts are made a lien upon it, and it is disposed of for the purpose of satisfying them. To permit a bankrupt, after he knows he is insolvent, to revive satisfied liens in order to pay a part of his creditors, would be as fatal to the rights of his other creditors, as palpable a violation of the objects as well as of the letter of the act, as if he was permitted to create new liens for the same purpose. The bankrupt law itself, as well as the general principles alluded to, in the most clear and emphatic terms, prohibit any such revival. The mortgage is a lien, therefore, only for the amount remaining due on the \$5,000 mortgage.

The most important question in the case was, and is, the amount if any due, on that mortgage. For some reason undisclosed by the counsel in the case, the requisite evidence was not given on the trial to enable the referee to decide this question, and until it is decided no judgment can be ordered that will accurately settle the rights of the parties.

Plaintiff, as assignee of the bankrupt, holds the title to the land, and the bankrupt law entitles him to recover it or the value of it. (Section 35 of bankrupt law.) If a conveyance

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has been made or incumbrance imposed on the property by the person claiming it as purchaser under the bankrupt, the law permits the assignee to sue for and recover the value. It thus enables the assignee to ratify and confirm the sale; prevents litigation and at the same time fully secures the rights of the creditors.

I am unable to perceive any reason why the assignee may not ratify a sale thus made, provided he can recover of the person liable over to him the fair value of the property, nor why he may not release or quitclaim to the purchaser his interest as assignee, so as effectually to cure any defect there might be in the title by reason of the proceedings in bankruptcy, and the assignment to him. If there has been no sale of the premises, then he must proceed to recover them by an action of ejectment. If the person in possession is in as mortgagee or assignee of a mortgage, the assignee cannot recover the possession unless he shows the mortgage paid. (4 Abbott Dig., 56, § 128.) If he cannot do this, then his remedy is in equity to redeem from under the mortgage, and he will be entitled to a judgment authorizing him to redeem on paying the amount due on the mortgage. The assignee might proceed in equity to compel a satisfaction of the mortgage upon the ground that it was fully paid. And if the fact of payment was made out he would be entitled to such relief. But if payment in full was not proved he would be entitled upon payment to redeem. These several modes of relief were open to the plaintiff.

To entitle plaintiff to recover in ejectment, the person actually in possession must be the party defendant. It is found by the referee that Wm. H. Babcock was in the occupancy of the premises at the commencement of the action. It follows that there can be no recovery in that form of action in this suit. In an action to redeem, the purchaser Babcock is a necessary party, and no relief can be given in that form of action without him. (*Dias v. Merle*, 4 Paige, 259.) Babcock is not a party, and hence there can be no judgment for redemption.

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It is found by the referee that the defendant, after Whiting was adjudged a bankrupt, proceeded as the assignee of the \$2,000 mortgage to foreclose it, but did not make the plaintiff a party defendant, and that judgment of foreclosure and sale was subsequently entered, and in pursuance thereof, the said premises were sold under the said judgment, and bid in by the defendant, who afterward sold them to said Babcock. Under these circumstances, no judgment, directing a cancellation or satisfaction of the mortgage, could be entered; it has ceased to exist; it is merged in the judgment, except so far as it may be in life to enable plaintiff to redeem. If I am right in these views, it follows that the only action the plaintiff could maintain against the defendant, would be to recover the value of the premises covered by the \$2,000 mortgage, and, I think, the complaint contains all the allegations necessary to entitle him to recover such value. But upon the finding of the referee, that something is still due on the \$5,000 mortgage, and as the defendant is entitled to hold the \$2,000 mortgage for such balance, he can only be liable for the value of the premises, after deducting therefrom the amount unpaid on the mortgage. As that balance has not been found, he is not entitled to judgment for the value, unless he is willing to call such balance \$500, that being the highest sum that can be due thereon.

The referee has found the value of the premises to be \$2,200. The referee was, upon the evidence before him, strictly regular in dismissing the complaint.

But if the plaintiff is willing to admit that there was \$500 due on the \$5,000 mortgage at the date of the referee's report, and to give to Babcock a quit claim deed of his interest in said premises, I perceive no necessity for turning the parties over to another suit when their rights can be adjusted in this

Every fact necessary to be proved, to entitle the plaintiff to recover the value of the land, is found by the referee, and this court on the appeal, may now modify the judgment so as to afford the relief, which the referee could have given wher

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the case was before him. (*Marquat v. Marquat*, 12 N. Y., 336; 1 John's Cases, 499; 1 J. R., 529.)

I am in favor of affirming this judgment, unless the plaintiff shall, within twenty days after notice of this judgment, enter into a stipulation admitting that the sum of \$500 was due on the \$5,000 mortgage on the 9th August, 1869, and execute and deposit with the clerk of Jefferson county a deed, executed and acknowledged in due form of law, quitclaiming to Mr. William H. Babcock all his (plaintiff's) right, title and interest in and to said premises, as assignee of said Whiting, then the judgment of the referee shall be so modified as to require the defendant to pay to the plaintiff said sum of \$2,200, less said sum of \$500, and that plaintiff have execution for the balance. If the judgment is so modified, then neither party shall have costs against the other. If the plaintiff shall refuse to stipulate, and to execute, and deliver said deed as above directed, then the judgment of the referee is affirmed with costs.

MORGAN, J., was for an absolute affirmance.

Judgment affirmed, unless, &c.

PENTHOUS DART, Appellant, v. CHARLES ENSIGN, Respondent.

(GENERAL TERM, FIFTH DISTRICT, APRIL, 1870.)

On receipt of goods at New York destined to Chicago, but consigned to an intermediate consignee at Buffalo, the carrier signed two bills of lading; one of them he retained, and it required delivery at Buffalo, named the charge for freight to that place, and directed the consignee to pay the shipper or his order, specified advances made by him to the carrier; the other was identical with it, except in containing an additional memorandum of the charge for freight from New York to Chicago, and further consigning the goods to a Chicago consignee, and was sent by the shipper to the Buffalo consignee. The carrier delivered the goods to the consignee at Buffalo.—*Held*, that the latter became liable for the freight money earned on acceptance of the goods, and that the carrier could recover the same of him.

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Held further, that the said consignee, having no interest or ownership in the property, was not liable for demurrage, on account of unreasonable delay in unloading at Buffalo.

THIS was an appeal from a judgment on the report of a referee.

The plaintiff was the owner and master of a vessel, and received from a shipper in New York, a cargo of iron, on the receipt of which he signed a bill of lading as follows:

MERCHANT'S LINE.

"Shipped, New York, October 12th, 1868, in good order, by H. N. Holt, on board boat Gilbert Candee, of Buffalo, whereof E. Dart is master, the following articles:

Care Chas. Ensign, Buffalo, N. Y.	775 Bars R. R. Iron....	308,000.	
For I. F. Fox, care Chi- cago, Burlington & Quincy R. R., Chicago, Ill.	Advance cash, N. Y....	\$25 00	From N. Y. to
Delivered at their dock.	River tow.....	30 00	Chicago, \$6.25
	Tolls, B't.....	6 90	per tons net
	Tolls, Cargo.....	212 52	
	Check, Troy.....	138 10	
		<u>\$412 52</u>	

"To be delivered at the port of Buffalo, freight at two dollars per gross ton, over tolls and over unloading.

"Received from H. N. Holt, four hundred and twelve 52-100 dollars, advanced on account of freight and toll hereon, which consignee will pay him or order.

\$412.52.

P. DART, *Master*."

This bill of lading was sent by the shipper to Ensign, the consignee at Buffalo, by mail, and was received by him. The plaintiff at the same time signed another bill of lading, the same in terms with that above set forth, omitting the memorandum: "For I. F. Fox, care Chicago, Burlington and Quincy Railroad, Chicago, Ill., deliver at their dock;" and also, "from New York to Chicago, six dollars and twenty-five cents per ton net;" the latter he retained in his possession.

The plaintiff delivered the cargo at Buffalo in due season as consigned, and it was received by the consignee, the

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defendant. No claim was made at the time of delivery for back freight, and the delivery was without notice of any lien or claim thereon, but a demand of the freight was afterwards made of the defendant, and payment refused.

There was delay at Buffalo in unloading the boat, on account of the defendant's neglect to receive the cargo upon its arrival. The plaintiff sued for the balance of freight charges to Buffalo, and also for damages by way of demurrage on account of the delay. The referee dismissed the complaint, and plaintiff appealed.

Messenger & Jenkins, for the appellants.

A. Perry, for the respondent, insisted substantially, with other points, that the bill of lading in this case differed from that in ordinary use, under which a consignee is held liable for freight, in that it made no provision for the payment of freight by the consignee, and that without such provision, and no other facts having been proved from which a contract to pay freight could be implied, the consignee could not be charged.

Present—MULLIN, MORGAN and DOOLITTLE, JJ.

By the Court—MULLIN, P. J. There were two bills of lading signed by plaintiff, the one showing consignment to the defendant at Buffalo, that consignor had paid \$412.52, which sum consignee was directed to retain for consignor out of freight earned by plaintiff. The freight came to \$616.

By the other bill of lading the goods were consigned to Fox of Chicago to the care of defendant at Buffalo. Freight to Chicago, \$6.25 per ton, of which two dollars was to Buffalo. The two dollars was over tolls and unloading.

It would seem that the latter bill was intended to accompany the goods to Chicago, the other to accompany them to Buffalo only. The plaintiff knew from the second bill above mentioned, that defendant was not owner of the goods; that

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he received the goods only to forward them to Fox at Chicago. The plaintiff, when he delivered the goods to the defendants, had a lien for their carriage. His obligation to carry terminated at Buffalo, and his freight was then earned. When he delivered the goods to defendant he either transferred to him his lien, or he surrendered the property relieved from all lien.

It is obvious that it was the understanding between the consignor and the plaintiff that the latter was to be paid at Buffalo, as from the freight to that point the consignor's advances were to be retained. There was no one but plaintiff to pay. It is not to be presumed that, in view of these provisions, the plaintiff parted with his lien and consented to look to Fox, or the Chicago B. & Q. R. R. Co. for his pay. The defendant was, I think, bound to pay freight when he accepted the goods. He was not liable for demurrage if it was found that the detention was unreasonable. To subject an intermediate consignee to liability for damages in the nature of demurrage, he must own or have an interest in the property. The consignee at the place of final delivery may be liable although not interested in the property.

For these reasons, I think the referee erred in his conclusions of law, and the judgment must be set aside and the order of reference vacated.

Judgment reversed.

STEPHEN P. RHINER, Respondent, v. GEORGE SWEET, CHRISTOPHER B. RHINER, NICHOLAS WAGONER and PHILO SWEET, Appellants.

(GENERAL TERM, FIFTH DISTRICT, APRIL, 1870.)

An agent of a firm after its dissolution and a settlement of the firm accounts between the members thereof, except as to an outstanding partnership claim, collected the claim, and paid it over, in different amounts to two of the partners, there being five altogether. One of the partners, who had received none of the moneys, sued all the rest for an accounting, claiming to recover his proportion of the sums so paid; the

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referee without ascertaining the amount which each partner had received, directed judgment against them all as claimed.—*Held*, that there was no joint liability of the defendants, but that they were liable severally for the plaintiff's proportion of the sum received by them respectively, and that such sums being unascertained the judgment was erroneous and must be wholly reversed.

THIS was an appeal, by the defendants, from a judgment entered on the report of a referee, in favor of the plaintiff.

The action was brought to obtain an accounting, between the plaintiff and the defendants, as members of a copartnership, known as "The Carthage, Lowville and New York Line," and to recover the moneys found due thereon, to the plaintiff. The referee found, a partnership in the transportation business between the parties, which, commencing in February, 1861, was dissolved by consent in March, 1862, in which latter month an accounting was had between the partners, at which all claims between them were adjusted, except a claim with reference to injury to a cargo while *in transitu* upon a boat employed by them as carriers, and on account of which there were outstanding claims against the firm by the shippers, and also claims in the firm's favor for insurance; that after the dissolution and sometime in December, 1862, one Hartwell who had been an agent for the firm, and who was authorized to do so, adjusted and paid the claim for losses, and also received the insurance; and that after payment of the claims there had been a balance due from the agent to the company, and which was in the hands of the company to be divided among the partners, each being entitled to one-fifth thereof; and he gave judgment against the defendants in the plaintiff's favor, for one-fifth of such balance, with interest. Upon his report judgment was entered against the defendants with costs, and the defendants appealed. Other facts are stated in the opinion of the court.

George Gilbert, for the appellants.

J. B. Emmes, for the respondent.

Present—MULLIN, MORGAN and DOOLITTLE, JJ.

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By the Court—MULLIN, P. J. I entertain very serious doubts, whether the findings of facts in this case, are supported by the evidence. But, it is not necessary to examine that question, as the judgment must be reversed, whatever our views may be upon that question.

The plaintiff, and the four defendants, composed the firm known as The Carthage, Lowville and New York Line, and each was entitled to one-fifth part of the net earnings of the line. They settled, at the time of the dissolution, all their partnership matters, except such as were connected with the loss of one of the boats in the North river while being towed to New York city. The boat was insured for \$4,000. This sum was collected by the agent of the firm, and paid to the owners of goods, that were on board of the boat at the time of her loss, and injured thereby. There remained in the agent's hands after paying these damages, as is found by the referee, the sum of \$570.96, to be divided equally amongst the partners. Hartwell testifies that, after paying the damages, he had in his hands \$700. Of this sum, part he paid to Christopher B. Rhiner, but can't say how much, and part to George Sweet and Nicholas Wagoner. He paid none to Philo Sweet.

Assuming that there was evidence to authorize the finding of the referee, that the actual balance was \$570.96, and not \$700. Then, upon the evidence, this sum was paid to Sweet, Wagoner, and Christopher Rhiner. There is not a particle of evidence, that Philo Sweet ever received one penny of it; yet, by the judgment, he is charged with the payment of plaintiff's share of the \$570.96.

I know of no principle of law by which he can be so charged. In the settlement of partnership dealings, the state of the accounts between each partner and the firm, and between the partners themselves, will show the amount of profit or loss, and the amount which each owes, or which he is entitled to receive. The court will compel those who have received of the partnership property more than their share, to pay to those who have not drawn out all they were

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entitled to, an amount sufficient to make an equal division of the assets of the firm. No partner can be made liable for property taken by another.

When the \$700 came into the hands of Hartwell, it was as between him and the firm copartnership property. When he paid it to two out of the five partners, it was still partnership property. But if it was appropriated by the two to whom it was paid to their own use, each became, as between himself and the other members of the firm, a debtor individually liable.

Until it is ascertained how much each partner received, it is impossible to say how much he should refund. The referee should have ascertained this important fact; and having ascertained that, and the amount each partner was entitled to, he should have ordered judgment, that each partner who was found to have received more than his share, should pay such excess to those who have had less than their share, or to pay it into court, so that it might be paid over to them. In no event, can those who have received more than their share, be made jointly liable for such excess.

The judgment must be reversed and a new trial ordered, costs to abide event. The order of reference is vacated.

Judgment reversed.

WILLIAM H. PHILLIPS, Appellant, v. JOSEPH WILPERS,
Respondent.

(GENERAL TERM, THIRD DISTRICT, SEPTEMBER, 1869.)

The plaintiff suspended a scaffold, in front of a house upon which he was employed as a painter, by fastening one of the ropes attached thereto to the chimney of the defendant's adjoining house, without the latter's permission; as he stepped upon it, on returning to his work, the rope untied from the chimney and he received injuries by the fall of the scaffold for which he sued the defendant. Upon the trial it appeared, that the defendant, having been informed that the rope was fastened to, and that it endangered his chimney, was afterward, on the day preceding the acci-

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dent, seen upon his roof handling the rope; that afterward, when charged with causing the accident he did not deny it, but offered to pay for medical attendance to the plaintiff, if not excessive in amount. At the close of the plaintiff's testimony the court refused a nonsuit; but after the defendant had given evidence contradicting that of the plaintiff, and tending to show that it was manifestly untrue, and had himself sworn, that he did not touch the rope, or know what was suspended to it, on renewal of a motion, therefor, it was granted.—*Held*, that the evidence should have gone to the jury, and the nonsuit was wrong.

Held further, that the defendant was not justified by the plaintiff's trespass, in recklessly unloosening the rope; and that it was for the jury to say whether he did unloosen it, and if so, whether he exercised proper care in ascertaining what was fastened to it.

THE plaintiff was by trade a painter, and for the purpose of painting the front of a three story house in the city of Albany, fastened one of the ropes of his scaffold, by tying it to the chimney of the house adjoining, which belonged to, and was occupied by the defendant; and having been injured on account of the falling of the scaffold, brought a suit to recover damages therefor from the defendant.

being Upon the trial, he proved that the accident happened on Monday morning, as he went upon the scaffold to his work; that the scaffold had been hung and carefully tried on the previous Saturday; that the rope in question was securely tied to the chimney, and that the scaffold fell on account of its ~~having~~ unfastened therefrom. One Smallman, a boy of the age of fourteen years, testified for the plaintiff, that he saw the defendant on the evening preceding the accident, on the roof of his house along side of the chimney, with the rope of the scaffold in his hands; the witness testified, that he saw the defendant under such circumstances, while he, the witness, was in the yard, in the rear of the house, in a position from which he could see some three feet of the chimney. The plaintiff's brother testified, that he had charged the defendant with causing the accident, soon after its occurrence, and with untying the rope, and that the defendant was excited and troubled, and did not deny the charge, and in reply to a suggestion from the witness, that he would pay the doctor's fees, &c., said, that he would if they were not made too big.

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The defendant testified, that he had been informed, while in his rear yard with his wife, and the boy Smallman, on the day prior to the accident, at a time corresponding with that at which Smallman claimed to have seen him on the roof, that the rope was fastened to his chimney, and to a tree, and that the chimney was likely to be injured thereby; that he then went on the roof, looked over the side, saw nothing suspended to the rope, and that it was not fastened to a tree, and without touching the rope came down, and that he did not know what was fastened to the rope. The defendant's wife testified on his behalf, that from the position in the yard, from which the witness, Smallman, claimed to have seen the defendant on the roof holding the rope, that but very little of the chimney could be seen; and that the defendant could not be seen at all. The defendant also called one Stearns, who testified that he had gone with one Latta, to the defendant's premises for the purpose of ascertaining how much could be seen from the yard of a person on the defendant's roof; that from the yard none of the front of the chimney could be seen, and but about two bricks from the top of the rear part of the chimney; that when a man stood opposite the rear of the chimney, the top of his head only could be seen. Latta, also testified, that he remained on the roof, which was shown to have been a flat roof, while Stearns was in the yard, placing himself on the rear side of the chimney, and in different positions, and that when looking down as he stood upon the rear of the chimney, he was able to see only the head of Stearns.

The court refused a nonsuit at close of plaintiff's testimony, but on application, after the defendant's testimony had been given, granted it, and the plaintiff appealed.

R. W. Peckham, Jr., for the appellant.

Isaac Lawson, for the respondent.

Present—INGALLS, HOGEBOM and PECKHAM, JJ.

By the Court—INGALLS, P. J. At the conclusion of the

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evidence upon the application of the defendant's counsel the court directed a nonsuit, and refused to submit the case to the consideration of the jury. After a careful examination of the evidence we have arrived at the conclusion that the nonsuit should not have been granted. To justify the court in withholding a cause from the jury, the case should be very clear, so much so, that no reasonable doubt can be entertained in regard to the facts. In this case, the evidence shows that the rope was securely fastened to the defendant's chimney and did not break; the witness, Smallman, testifies that on Sunday he saw the defendant upon the roof having hold of the rope. It further appears that the defendant was informed before he went upon the roof, that the rope was attached to the chimney and to a tree, and that by the blowing of the wind the chimney might be injured if the rope was allowed to remain. There is also the additional evidence that after the plaintiff was injured the defendant was informed of it, and charged with having caused it, which he did not deny, but stated substantially that if the expense for medical attendance was not excessive he would pay it. It is insisted by the defendant's counsel that the defendant denies under oath that he touched the rope, or that he agreed to pay the expenses, and further insists that the evidence shows that the witness Smallman, could not have seen the defendant upon the roof near the chimney, from the place where Smallman was located. These were considerations proper to be submitted to the jury. In cases where the evidence is conflicting, and particularly where a question of credibility is raised it is unusual to withhold the case from the jury. In the hurry of the circuit little time is allowed for anything like a deliberate and careful consideration of the evidence. Doubtless the learned judge was strongly impressed with the conviction that the plaintiff's case was so far disproved and overcome by the evidence on the part of the defendant, that the verdict of the jury if rendered in favor of the plaintiff could not be upheld. It is quite possible that the jury might have taken quite as favorable a view of the evidence in favor of the

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defendant. I think the plaintiff was entitled to the privilege of taking that risk. It is further insisted by the counsel for the defendant, that the defendant was justified in removing the rope because it was attached to the chimney without his permission. That would be so under certain circumstances, but that right must be exercised in such manner as not to betray a reckless disregard of the safety of others. A technical trespass would not justify the infliction of irreparable injury, and the assertion of a right must be qualified by a reasonable regard for the security of others. It is said that the defendant had no reason to infer that the rope sustained the scaffold. I think it was for the jury to say whether he should not have ascertained the fact before he loosed it, and whether it should not have occurred to a reasonable mind that the rope was attached to the chimney to subserve some purpose, and not placed there through mere wantonness. If the defendant intended to remove the rope, which he doubtless had a right to do properly, he was bound to exercise reasonable prudence, and to have accomplished the work in such manner as to give notice to those who could be affected thereby. If the jury should conclude that the defendant only partially unloosed the rope, so that while it appeared to those who went upon the scaffold to be secure, yet when weight was applied it gave way, they might regard it little better than a trap well calculated to produce serious injury. Under such circumstances, an act which in itself might be lawful, would, by the manner in which it was executed, become unlawful and subject the party to damages. / In discussing this case, we do not intend to be understood as even intimating what conclusion should be drawn by the jury from the evidence, conflicting as it is, but our object, is simply to ascertain, whether the evidence, so overwhelmingly preponderated in favor of the defendant, as to justify taking the case from the jury. We are of opinion that the nonsuit was improper, and that a new trial should be ordered, with costs to abide the event.

New trial granted.

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McMullin v. Wooley.

JOHN McMULLIN, Respondent, v. ALMON WOOLEY, Appellant.

(GENERAL TERM, FIFTH DISTRICT, OCTOBER, 1868.)

The grant of a right to conduct water, by means of pipes laid beneath the surface of land, from a spring thereon, is a grant of an easement, and not of any part of the land itself.

The existence and user of such an easement, by the grantee thereof, constitutes no breach of a covenant for quiet enjoyment or of warranty in a subsequent deed by his grantor.

It seems that to protect himself against an easement upon land, the purchaser must take a covenant against incumbrances.

THIS was an appeal from a judgment, entered on a verdict rendered at the Jefferson County Circuit.

The action was to recover damages, upon a contract to pay interest on the purchase money of certain premises, and for damages done to said premises, after the defendant had contracted to sell them to the plaintiff, and before conveyance; and also, for breach of a covenant of warranty, and for quiet enjoyment, contained in the deed afterward executed and delivered, pursuant to the contract. It appeared that before the deed to plaintiff, the defendant had granted to one Wilson, a right to draw water from a spring upon the premises in question, by means of pipes laid under ground, and that this right, though without the plaintiff's knowledge, was used and enjoyed at the time of the conveyance, and afterward.

The plaintiff had a verdict for damages, on all the causes of action alleged in his complaint, and the defendant appealed.

Brown & Beach, for the appellant.

Lansing & Sherman, for the respondent.

Present—FOSTER, MULLIN and MORGAN, JJ.

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By the Court—MULLIN, J. The right granted by defendant's grantors, to William H. Wilson, to lay pipes in his (the grantor's) land, and divert the water thereof to his (Wilson's) own land, for the use of his cattle, is an easement; and the deed granting the easement conveys no part of the land on which the spring is, or in which the pipes are laid. (Angel on Watercourses, sections 90, 161, 163, 285.)

The existence of such an easement, if it can be held to be a breach of any covenant in a deed, is a breach of the covenant against incumbrances. (Rawle on Covenants of Title, 114, 115, and cases cited.)

I can find no case in the books, in which it has been held that such an easement, is a breach of either the covenant for quiet enjoyment, or of warranty; and, upon principle, it would seem to me that it cannot be.

To constitute a breach of either of these covenants, there must be an ouster, either actual or constructive, of the premises conveyed.

An ouster, is an actual deprivation of the possession of a part of the land, or, what is equivalent, a title, which is capable of being used to deprive the grantee of his possession, of a portion of the land, covered by his deed.

Now the withdrawing through pipes, of water from a spring, is in no sense a deprivation of a part of the land; and hence, when a purchaser desires to protect himself, against the existence of such an easement on his land, he must take a covenant against incumbrances; or if the existence of it is concealed from him, and he has no such covenant, then he must sue for the deceit. (Rawle on Covenants of Title, 118, 120.)

If this is a correct exposition of the law, the plaintiff was not entitled to recover for a breach of the covenant set out in the complaint, and the judgment should be reversed, unless the plaintiff will stipulate to deduct the amount allowed by the jury for the spring, in which event the judgment is affirmed without costs.

Ordered accordingly.

The People v. Miner.

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83h 459THE PEOPLE, &c., Respondents, v. DAVID M. MINER,
Appellant.

(GENERAL TERM, FIFTH DISTRICT, JANUARY, 1868.)

Neither section 480 nor section 482 of the Code, confers upon the attorney-general, the power to prosecute an action in the name of the people, against commissioners appointed under an act of the legislature, to restrain them from issuing, &c., town bonds, provided for by such act, without performance of the conditions precedent required thereby; nor has he such power at common law.

The attorney-general has the power belonging to that officer at common law, and such additional powers as the legislature has conferred upon him. Per MULLIN, J.

But the only cases in which at common law he was authorized to interfere to restrain corporate action, or was a necessary party to an action for that purpose, were those in which the act complained of, would produce a public nuisance or tend to the breach of a trust for charitable uses. *Id.* The case of *Davis v. The Mayor, &c., of New York* (2 Duer, 663), commented on and explained, and certain dicta in that and in other cases disapproved, and the cases therein cited, examined. *Id.*

THIS was an appeal by the defendant from a judgment for the plaintiff entered on a referee's report.

The action was brought under leave obtained therefor in the name of the people, &c., against the defendants, as commissioners, appointed under the act of April '23, 1867 (chap. 581, p. 1561) for the town of Augusta, in Oneida county, for a perpetual injunction restraining them from issuing certain bonds authorized by that act for railroad purposes. The referee reported against the validity of the bonds, on account of the commissioners' failure to take the requisite preliminary steps, under the statute, to authorize their issue, and judgment was entered in accordance with the prayer of the complaint.

O. S. Williams, for the appellant.

Marshall B. Champlain, attorney-general, for the respondent.

Present—FOSTER, MULLIN and MORGAN, JJ.

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MULLIN, J. In the case of *Know v. Miner et al.*, in which an appeal was argued at the last term, from an order dissolving an injunction, I came to the conclusion, that the plaintiff in that case, could maintain an action to restrain the issuing of the bonds, of the town of Augusta, to secure the payment of moneys borrowed, to be applied in payment of stock in the Utica, Clinton and Chenango Railroad Company; and I came to the further conclusion that there was no equity in the complaint, entitling the plaintiff to the relief demanded.

The last mentioned question arises in this case, also, together with the one whether the attorney-general can maintain the action in his own name, or in the name of the people of the State of New York. It is unnecessary for me to repeat, what I have said in the other case, as to the merits of the action. I shall, therefore, confine myself to the other question, viz.: Whether the people can maintain an action to restrain the issuing of bonds, provided for in the act of April, 1867.

It is too obvious to require argument, that the people, and by the people I mean the State, in its corporate capacity and character, has no manner of interest in the litigation. Its rights are in no way injuriously affected, and its interference, must be permitted, either, because there is no other person or corporation capable of suing, or because by the practice of the courts the attorney-general, as the representative of the people, is charged with the duty of interfering, in all cases where private persons are held incompetent to sue, and when the rights of the whole people, or any considerable portion of them, are in danger from the unlawful acts, of persons acting, or assuming to act, under color of lawful authority, or otherwise.

I shall proceed to consider whether the attorney-general can maintain this action.

Before the adoption of the Code, there had been no attempt by the legislature, to enumerate the cases, in which the attorney-general might institute suits, or proceedings, for the enforcement or protection, of the rights of the public, or of

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individuals. The office of attorney-general had existed several centuries in England before the formation of the colonial government in this country, and his duties were well understood, and quite clearly defined.

Most, if not all, of the colonies appointed attorney-generals, and they were understood to be clothed, with nearly all the powers, of the attorney-generals of England, and as these powers have never been defined we must go back to the common law in order to ascertain them. The attorney-general had the power, and it was his duty :

1st. To prosecute all actions, necessary for the protection and defence of the property and revenues of the crown.

2d. By information, to bring certain classes of persons accused of crimes and misdemeanors to trial.

3d. By "*scire facias*," to revoke and annul grants made by the crown improperly, or when forfeited by the grantee thereof.

4th. By information, to recover money or other chattels, or damages for wrongs committed on the land, or other possessions of the crown.

5th. By writ of *quo warranto*, to determine the right of him who claims or usurps any office, franchise or liberty, and to vacate the charter, or annul the existence of a corporation, for violations of its charter, or for omitting to exercise its corporate powers.

6th. By writ of *mandamus*, to compel the admission of an officer duly chosen to his office, and to compel his restoration when illegally ousted.

7th. By information to chancery, to enforce trusts, and to prevent public nuisances, and the abuse of trust powers.

8th. By proceedings *in rem*, to recover property to which the crown may be entitled, by forfeiture for treason, and property, for which there is no other legal owner, such as wrecks, treasure trove, &c. (3 Black. Com., 256-7, 260 to 266 ; id., 427 and 428 ; 4 id., 308, 312.)

9th. And in certain cases, by information in chancery, for the protection of the rights of lunatics, and others, who are

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under the protection of the crown. (Mitford's Pl., 24-30, Adams' Equity, 301-2.)

This enumeration, probably does not embrace all the powers of the attorney-general at common law, but, I apprehend, it embraces all the powers, under which the right to bring this action could or would be claimed. And it is also doubtless true, that in the foregoing enumeration, I have put under separate heads, powers which should be embraced in one, but it is more important, to ascertain the powers of the office than to secure an accurate classification. As the powers of the attorney-general, were not conferred by statute, a grant by statute of the same or other powers, would not operate to deprive him of those belonging to the office at common law, unless the statute, either expressly, or by reasonable intentment, forbade the exercise of powers not thus expressly conferred. He must be held, therefore, to have the powers belonging to the office at common law, and such additional powers as the legislature has seen fit to confer upon him.

There is nothing in the Code, which manifests the intention, to take from the attorney-general any of his common law powers, which under our institutions and laws he could properly exercise. The Code confers on him, no power to enforce trusts for charitable purposes. Illiberal as both the legislature and the courts have been in permitting the creation of such trusts, several have been held to have been legally created, and there is no one but the attorney-general who has the power to institute proceedings in regard to them. It surely, was not the intention of the legislature, to place these trusts beyond the protection of the law, and permit the trustees to appropriate to their own use, property set apart for purposes held to be sacred, in all other countries whether pagan, or Christian. If this power has not been taken away by the Code, it cannot be claimed, that any of the other common law powers, have been taken away, theretofore properly belonging to the attorney-general.

I will now proceed to inquire whether this action can be maintained under any of the powers conferred by the Code.

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It is claimed by the plaintiff's counsel, that the power to maintain this action is given by the fifth subdivision of section 430 of the Code, which is in these words, viz.:

"5th. Whenever it (a corporation) shall exercise a franchise or privilege not conferred upon it by law."

The first clause of the section, permits an action to be brought by the attorney-general, on leave granted by the Supreme Court, for the purpose of vacating the charter, or annulling the existence of a corporation, other than municipal, whenever it shall be guilty of the five acts, or omissions, enumerated in the section.

The first answer to the proposition of the counsel is, that this action is not one which the attorney-general, on obtaining leave, is authorized to bring. This is not an action to annul the charter of any corporation; it is to declare void, official acts. If the attorney-general has the right, and it is his duty, under this section of the Code, to bring an action, whenever a corporation shall fail to conform, to the provisions of its charter, or other act of the legislature, in the use of its franchise, a large share of the litigation of the State will be transferred to that officer, and he will find himself overwhelmed with duties not hitherto supposed to attach to his office.

It would be unwise, as well as mischievous, to permit this officer, or any other, to intermeddle with the affairs of the private or public corporations of the State, when the stockholders, or others, whose interests are affected are entirely competent to protect them.

And nothing could more clearly demonstrate the injustice of the rule, which would take from the individuals who are aggrieved by the illegal acts of corporations, or public officers, and confer upon the attorney-general, or other officer, the power to maintain actions for such injuries, than the consequences which must necessarily follow from the grant of such power. The officers of corporations will soon cease to be guided by the wishes or interests of those for whom they act, but will look to the attorney-general, as the one who

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alone can punish, and who will, when conciliated, be both able and willing to protect them.

The only remaining ground suggested, on which the attorney-general may maintain this action, is the first clause of section 432, which is in these words, viz.: "And actions may be brought by the attorney-general upon his own information, or upon the complaint of any private party offending, in the following cases, viz.:

"1. When any person shall usurp, intrude into, or unlawfully hold, or exercise any public office, or any franchise within this State."

If the clause in question could be held to apply to such a case as the one before us, it is an essential element of the right of action, that the person proceeded against should have unlawfully exercised a franchise within this State.

I assume, for the purposes of the argument, that the right, or power to borrow money, issue bonds, and subscribe for stock, is a franchise within the meaning of the section in question. The act of 1867 expressly confers upon the commissioners the power to do each, and all of these acts. It cannot be said, therefore, that the commissioners can unlawfully do these acts. The complaint against them, is not that the statute has not conferred the power, but it is that it required the performance of certain conditions, precedent to the right to borrow money, issue bonds, or subscribe for stock; and these conditions have not been performed.

There has been an attempt at performance, and it may be that there has not been a literal performance of the conditions; and if not, then it is for the courts to say whether the taxpayers are bound. If not, they have, or should have relief against an abuse of power, or a failure to comply with the provisions of the statute. If nonconformity to the provisions of a statute, prescribing the duties of a public officer, or board, whose duties affect the whole, or some considerable portion of the people, makes it the duty of the attorney-general to intervene, to prevent, or to remedy the wrong if committed, it necessarily follows, that he must

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intervene in every case of the kind, unless some special injury is done to some individual, which will entitle him to sue for the protection of his own rights. It cannot require argument to show that such doctrine will produce endless mischief, will leave the people without any adequate protection against abuses of power by public and corporate officers and agents. For these reasons I am of the opinion that this action cannot be maintained under any provision of the Code of Procedure.

The next question for consideration is, whether the attorney-general has the right at common law to maintain the action.

No such power is embraced in the first, second, third, fourth, fifth or sixth of those enumerated above.

It is not pretended that it is within the seventh, which relates to charitable uses.

In support of the proposition that the attorney-general has power at the common law to maintain this action, I am referred to the case of *Davis v. The Mayor of New York* (2 Duer, 663), and certain dicta in several other cases decided in this State. The action was brought in that case to restrain the corporation from granting to several persons the right to construct a railroad in Broadway, in said city. An objection was taken that the attorney-general was a necessary party to the action, and the court, after argument, held him to be so, and that without him final judgment could not be entered.

Laying a railroad in a street, without the permission of the legislature, or officer or body having authority to consent to such an appropriation of it, is creating a public nuisance, the attorney-general had the power, and it was his duty to proceed by information in chancery to prevent the nuisance. (*Attorney-General v. Forbes*, 2 M. & C., 123.)

The defendants in this case were proceeding to destroy the supports of one-half of a bridge located partly in two counties, in consequence of which all travel over it would have been prevented. The chancellor says if the defendants so execute what they conceive to be their duty as to create or

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occasion a public nuisance, this court has an undoubted right to interpose.

In a note to this case, at page 133, is given an extract from the opinion of Lord COTTENHAM in *Frewin v. Lewis* (4 M. & C., 249), in which it is said that the Court of Chancery has no power to restrain poor law commissioners and other public functionaries from exceeding the powers conferred on them by law. But it is not said that the power of the court may be invoked by the attorney-general, unless the illegal act, if done, would produce a public nuisance. When it produces this result, and no one individual or number of individuals sustain a special injury, the attorney-general alone can proceed. When individuals sustain a special injury, they may maintain an action alone, or in conjunction with the attorney-general, or the attorney-general may proceed alone.

The decision in *Davis v. The Mayor, &c.*, *supra*, may be, and probably is, correct, so far as the question of the propriety of making the attorney-general a party is concerned. But I cannot concur in the numerous dicta contained in the opinion as to the cases in which the attorney-general has the power to maintain actions to restrain or regulate corporate action.

The general rule which DUER, J., extracted from the English cases is this, that when the act of municipal corporations, which is the subject of complaint, affects injuriously the public at large, that is, the entire community over which the corporate jurisdiction extends, the attorney-general is a necessary party to the prosecution of the suit.

I entertain the most profound respect for the ability and learning of the learned judge, but I cannot agree with him that there is any such general rule. I think it will be found, upon an examination of the cases from which he deduces the rule, that they do not authorize the inference, and that there are but two classes of cases in which the attorney-general is a necessary party; one is where the unauthorized act of the corporation will produce a public nuisance, the other

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is when it tends to or is a breach of some trust for charitable uses.

Of the cases cited in the opinion of Duer, J., there are several in regard to which a brief explanation is necessary in order that they may be the better understood.

During the reign of the predecessor of the present queen of England, a law was passed by parliament changing the organization of several of the municipal corporations of Great Britain, and amongst others transferring the property of such corporations to an officer designated the borough treasurer, to be held by him, and the income appropriated to certain specified purposes and objects. In some instances the corporations to which the act applied attempted, before its passage, to transfer portions of their property to third persons, to be by them held in trust for certain purposes to which it could not be applied under the proposed act of parliament. The act provided that certain officers in the old corporations who were entitled to salaries or other emoluments of their offices, should not be elected or appointed to the same or similar offices in the new organizations.

Having premised this much as to the act referred to, I will now proceed to examine the cases arising under it cited by Duer, J.

In the *Attorney-General v. Aspinall* (1 Keen., 513), the information was filed for the purpose of setting aside a mortgage and an appropriation of money raised by the corporation of Liverpool to endow certain clergymen officiating in that city, made by the old corporation, after the passage of the act above mentioned, and before the election of officers under the new organization. The defendant demurred. The master of rolls allowed the demurrer, holding that the old corporation had the right to make the appropriation, it being for the benefit of the inhabitants. But on appeal to the lord chancellor, the decree of the master of rolls was reversed. (2 M. & Craig, 613.)

The chancellor held that the funds belonging to the municipal corporations named in the act became, upon its passage,

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subject to certain public trusts, to be exercised by the new council only in the manner and for the purposes described in the act. He also held that an appropriation by the old corporation, after the passage of the new act and before the election of the new council, was not warranted by the act, and was therefore a breach of trust. He also held that when property is devoted to trusts which are to arise at a future time, and be exercised by trustees who are not yet *in esse*, any intermediate act done by the holders of such property, inconsistent with the security of the property, or the performance of the trusts when they shall arise, will be set aside, and if the trusts are of a public nature, the court will entertain jurisdiction upon information by the attorney-general, notwithstanding the trustees, after they have come *in esse*, decline to interfere.

At page 61 of the case it is said, if the property in question be subject to any public trust, and if the appropriation complained of be not consistent with such trust, but for purposes foreign to it, and there be not in the municipal corporation act, any provision taking from the court its ordinary jurisdiction in such cases, then it will follow that the attorney-general has, under the circumstances stated, a right to file the information, and to pray that the fund may be recalled, secured and applied for the public, or in other words, charitable purposes, to which it is by the act devoted.

I have given more time to this case than I otherwise would have done, because it is a leading case under the act referred to, and is, moreover, a very able and elaborate discussion of the question presented on the appeal.

In the *Attorney-General v. The Corporation of Poole* (2 Keen., 190), the attorney-general filed an information at the relation of certain rate-payers of the borough of Poole, to have it declared that one Parr, who had been corporation clerk of Poole, was not entitled, under the act above mentioned, to any compensation in respect to his office, or if any, not to as much as the defendant had awarded to him, and that a bond given to him for the sum awarded by the corpo-

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ration might be given up to be canceled as fraudulent and void. It was claimed that Parr had resigned his office, and was not for that reason entitled to compensation under the act. A rate had been ordered to raise the money to pay the bond, and the rate-payers were the relators praying for relief against such rate. The defendants demurred, and the demurrers were allowed, the master of rolls holding that the statute provided a mode for redressing the wrong complained of, and it should be followed. But if the court would entertain jurisdiction, sufficient was not stated, to entitle the relators to relief. The only ground suggested on which relief in equity could be invoked was the protection of the trust property against a gross breach of trust. On appeal to the lord chancellor the decree was affirmed (4 M. and C., 17), but he reiterates his opinion in the case of the *Attorney-General v. Aspinall*, that the statute above mentioned created a trust, and that the court had jurisdiction to protect and enforce it on this relation of the attorney-general's; but concurring with the master of the rolls, that the information did not make a case entitling the complainant to equitable relief, he sustained the demurrers, but allowed the relator to amend.

In the case of the *Attorney-General v. Wilson* (9 Sim., 30), the information was filed upon the relation of the new corporation created under the act of parliament, so frequently referred to, to compel the return to the corporation of certain stocks which the old corporation had attempted to place out of the reach of the new corporation before the passage of the act. There was a demurrer. It was overruled by the vice-chancellor on the ground that the stock was part of a trust fund which it was the duty of the court to protect, and that the attorney-general was a proper party plaintiff.

Relief was granted in the *Attorney-General v. The Mayor, &c., of Liverpool* (1 M. & C., 171), arising on the aforesaid statute, on the ground that the property was trust property.

In the case of the *Attorney-General v. The Corporation of Norwich* (16 Simons, 225), the information was filed to restrain the defendant from appropriating money in the hands

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of the treasurer to procure an act of parliament to improve the river flowing through the city, so as to facilitate the operations of commerce, and which was collected under a local act of parliament, and required to be applied to purposes specified. An injunction had been obtained, and the defendants, on putting in their answer, moved to dissolve it. The motion was denied expressly on the ground that the intended appropriation would be a breach of trust.

In the *Attorney-General v. The Corporation of Litchfield* (13 Sim., 547), the same principle was applied. I have thus referred to all the cases cited in the opinion of DUER, J., except that in the 2d Bligh. U. R., 312, which I have not been able to find, and I think they all show quite conclusively, so far as they speak, that the attorney-general cannot proceed in chancery against a corporation to restrain its action unless it is on the ground of a breach of trust, or to prevent a public nuisance; and I have been unable to find any case in which his interference has been admitted upon any other ground. Of course, I do not mean to be understood as denying his right to apply to restrain corporations from exercising franchises not granted, or to annul corporations by reason of violations of their charters, or for non-user of their corporate powers. His right to interfere in these cases is expressly conferred, and must be exercised, or there would be a failure of justice.

The earliest reported case in this State in which the right of the attorney-general to maintain an action against a corporation has been considered, is that of the *Attorney-General v. The Utica Ins. Co.* (2 Johns. Ch. R., 371). There the attorney-general filed an information for the purpose of restraining the defendant from exercising banking powers, a franchise not granted by its charter, and which the legislature had forbidden to be exercised without authority of law. After a very able and elaborate review of the authorities, the chancellor held that the court had not jurisdiction to grant relief, and an injunction, which was moved for, was refused. He placed his decision on the ground that the

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remedy was at law, by writ of *quo warranto*, or information in the nature of that writ; that carrying on banking business without authority was not such a mischief or public nuisance that this court would grant an injunction even if it had jurisdiction over public nuisances, which he thought it had not.

The jurisdiction of chancery on the relation of the attorney-general to restrain acts which would produce a public nuisance, is well settled in England. In the case of the *Attorney-General v. Forbes*, *supra*, the jurisdiction was exercised. (See cases cited.)

Chancellor KENT doubted whether the court had jurisdiction or control over corporations in respect to breaches of trust unless they were charitable.

What constitutes a charity it is not always easy to determine. If all the moneys which belong to a corporation are impressed with a trust, and are to be deemed charitable, then, of course, the court has the right to prevent an illegal appropriation of them. But it seems to be considered in the English chancery that no property of a corporation is considered charitable unless it has been given to the corporation by the government or individuals to be devoted to the use of the public. And hence moneys raised by taxation is not within the control of the court.

The case of the *Attorney-General v. Heelis* (2 Sim. & Stu., 67) proceeds upon the distinction suggested, and is directly in point and against the power of the court to intervene in case of trusts not charitable.

The only recent cases I have found in this State or in England in which the power of the attorney-general to maintain actions against corporations for the violation of their charters are, *The Attorney-General v. The Birmingham and Oxford R. R. Co.* (8 Eng. L. & E., 243); *Rosevelt v. Draper* (7 Abb. Pr. Rep., 108); *The People v. Lowber* (7 Abb., 161); *Same v. The Mayor* (9 id., 253); *Same v. The Mayor* (10 id., 144); *Same v. Same* (32 Barb., 102).

In the case of the *Attorney-General v. The Birmingham R. R. Co.*, *supra*, the attorney-general filed an information

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on the relation of certain inhabitants of Stratford-on-Avon, to have it declared that the defendants were obliged to build a branch road extending from their main line to Stratford-on-Avon, and praying that they be enjoined from building the main line until, or any faster, than they built the branch, The vice-chancellor allowed a demurrer to the information for the want of equity. He held that the attorney-general had no right to interfere, and said "he has the power to come here and restrain public companies from doing an act which they are not authorized to do when it interferes with the right of the public." This remark is relied upon as authorizing his interference in all cases where municipal corporations violate their charters. No more is meant than that when the act done or threatened will be a breach of trust or produce a public nuisance, he may proceed.

There is a dictum in the opinion of BALCOM, J., in *Rosevelt v. Draper*, *supra*, that for abuses of corporate authority by the corporate authorities of a city in the disposition of its property, the tax-payers must find a remedy through the ballot box, the grand jury or the attorney-general. The question was not in the case, whether, in the case of an illegal disposition of corporate property, the attorney-general was a proper or necessary party.

In the *People v. Lowber* (7 Abb., 158), an action was commenced by the attorney-general on the relation of Flagg, comptroller of the city, to restrain the corporation and Tomber from completing a contract for the purchase and sale of a lot of land on which to construct a market in the city of New York, the purchase being alleged to be made by the corporation in violation of law, INGRAHAM, J., intimates an opinion that in such a case as was then before him, the attorney-general might maintain an action. The question was not directly presented, and the case passed off on another and different ground.

In the *People v. The Mayor* (9 Abb., 253), the same learned judge reiterates the views expressed in the former

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case. But the question was not directly before him, and the case was disposed of on another ground.

STRONG, J., in the *People v. The Mayor* (10 Abb., 144), adopts the views of INGRAHAM, J., in the preceding cases, and holds that the attorney-general may maintain an action to restrain a corporation from making an illegal or fraudulent disposition of its property.

In the case of the *People v. The Mayor* (32 Barb., 102), HOGEBOM, J., held that when there is a clear violation of law, or a clear misuser or abuse of corporate powers on the part of a municipal corporation, an injunction may issue, and the people in such case are a proper party. The learned judge cites no case which sustains the doctrine asserted by him, except the dicta in the cases in the first district, above cited. The case of *Hale v. Cushman* (6 Met., 425), is most decidedly the other way.

DENIO, J., in *Rosevelt v. Draper* (23 N. Y., 326), says the only remedial process against the abuse of administrative power tending to taxation which one can have, is furnished by the elective franchise, or a proceeding in behalf of the State, or, in case of an act without jurisdiction, in treating the attempt to enforce the illegal tax as an act of trespass.

After a careful and somewhat extended examination of the cases, I am unable to find any case in which the right of the attorney-general to maintain actions against municipal corporations has been carried to the length asserted in the opinion of HOGEBOM, J., and in 2 Duer, cited *supra*. And with the most profound respect for the learned judge, I think it is not in accordance with the decisions in this State or in England.

There is in the opinion of DENIO, J., in *Doolittle v. The Supervisors of Broome* (18 N. Y., 157), a very full examination of the cases which had been relied on in that case in support of the right of a citizen to restrain a municipal corporation from doing an unlawful act. And after declaring that he has no such right, he proceeds to give his views as to whom the right to maintain an action in such case belongs; and his conclusions are, that when the act done or threatened would

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result in a public nuisance the remedy is by indictment ; or when prevention is sought on information in equity by the attorney-general, and when the act threatened is a breach of trust, it is the duty of that officer to institute proceedings to prevent it. He does not intimate that there is any other case in which the people or their officer may maintain actions to restrain an unlawful exercise of corporate power.

If, however, it should be held to be the law that the attorney-general may proceed by information to restrain the abuse of corporate power, it does not follow that he has power to interfere in a case like the one before us. The commissioners are not a corporation ; they are mere agents, authorized to perform certain acts, which, when lawfully performed, bind the tax-payers of the town.

The reasons which induced the courts to recognize the attorney-general as the proper person to proceed against corporations do not apply to persons in the situation of these commissioners.

I have not thus far alluded to other cases referred to by plaintiff's counsel. I have examined the cases, and I do not find that they establish any rule different from that recognized in the modern cases, except one or two very old cases which would not, I apprehend, be held to be law at this day, either in England or in this country. I am utterly opposed to the adoption of a rule that will permit a State officer to intermeddle in the affairs of every corporation in the State. It can only lead to abuse, and to relieving persons directly in interest in them, from the duty and responsibility of seeing that abuses are corrected by those immediately concerned.

The order of the Special Term should be reversed.

Judgment reversed.

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ALBERT J. GILBERT, Respondent, v. ANDREW J. SHARP,
Appellant.

(GENERAL TERM, SEVENTH DISTRICT, DECEMBER, 1869.)

A promissory note, payable to order, was indorsed before maturity, to a holder for value and without notice of any defence, by one assuming to act for the payee, but having no authority to make the indorsement; after commencement of an action thereon by the indorsee the payee ratified the indorsement.—*Held*, that the note was open to defences, existing between the original parties thereto.

And, it seems, that a ratification before suit, if made after maturity, would not relate back so as to cut off a defence on the merits.

THIS was an appeal by the defendant, upon a case made, and exceptions, after judgment upon a verdict in favor of the plaintiff.

The action was upon a promissory note, payable to the order of one Palmer, and the defendant offered to prove a perfect defence, as between himself as maker, and the payee named in the note; the evidence was refused, and he excepted. The plaintiff claimed to be a *bona fide* holder for value paid before maturity. The facts sufficiently appear in the opinion.

George B. Bradley, for the appellant.

D. Rumsey, for the respondent.

Present—E. D. SMITH, JOHNSON and J. C. SMITH, JJ.

By the Court—E. DARWIN SMITH, P. J. This action was brought upon a negotiable promissory note, payable to George N. Palmer, or order, one year after date. It was indorsed without recourse by one Persons, without authority from Palmer, and delivered to the plaintiff, who paid for it a good consideration. After the maturity of the note, Palmer ratified the indorsement. It is conceded in the case, and was assumed and asserted by the learned judge at the circuit,

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and quite correctly, I think, that the note could not be enforced as between the original parties, and could only be enforced at law, at the hands of a *bona fide* purchaser, without notice of the defendant's rights and equities in respect to it. Two questions are, therefore, presented for our consideration on this branch of the case. 1st. Was the plaintiff, as a purchaser before its maturity, a *bona fide* holder of the note as indorsee by lawful transfer without notice of any defence to it? and, 2d. If not at the time of its transfer, because the indorsement was not made by Palmer, did he become such holder by force of the ratification of the indorsement by Palmer, the payee, after its maturity? The note is negotiable commercial paper; and no one can get a valid title, in law, to such paper, when it is payable to order, as is this note, without the proper indorsement of it by the payee. When the plaintiff took this note from Persons, the party who transferred it to him, it had not upon it, made by the payee, in his own proper handwriting, or by any agent duly authorized to make it, such indorsement. This fact seems to have been assumed, and held at the circuit; and the right of the plaintiff to recover upon it was put by the circuit judge, on the ground that the ratification, after the commencement of the action by Palmer, of the indorsement, was equivalent to an original authority. The case states further, that the learned judge held, "that although the indorsement was not made by Palmer, the payee, or by his authority, that his ratification, after it became due, related back to the time the indorsement was made;" and on this ground overruled evidence showing a defence upon the merits, as against the original holders of the notes; and the defendant's motion for a nonsuit was also denied upon this ground. It seems to me, that these propositions cannot be maintained, and that the exceptions to these rulings at the circuit are well taken. When the plaintiff took the note from Persons, he confessedly, within the assumption and proper ruling at the circuit, did not get to it any valid legal title. He did not become in a commercial sense a *bona fide* holder of the note. He had no

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lawful indorsement of it, without which by the law merchant title to it could not be acquired. The note was not made payable to a fictitious person, but to the original patentee of the patent, an interest in which was confessedly sold by the parties who took the note from the defendant and constituted the consideration of said note, and the plaintiff did not sue upon it as a note made to a fictitious person, but asserted title to it as indorsee of Palmer. As against a party ratifying an unauthorized act of the agent or partner, such ratification is doubtless equivalent to an original authority and operates as an adoption of the act, but this rule does not apply as between other parties interested in such act. The doctrine of *relation* is an equitable fiction to protect and effectuate substantial rights. It is not a doctrine to be applied to cut off equities and to further wrongs, or cover up frauds, or promote injustice. In *Bliss v. Cottle* (32 Barb., 325), we held that a ratification by a principal of the unauthorized act of his agent could not relate back to sustain an action not authorized when it was commenced, and that the plaintiffs were bound to show their right to commence their action when it was instituted, and so it was held in *Gorham v. Gale* (7 Cowen, 739). When this suit was commenced the plaintiff clearly had no legal title to the note, and no right of action under his complaint. The ratification afterward could only operate to the same effect as an original indorsement then made as against the defendant. This was expressly held in *Clark v. Peabody* (22 Maine Rep., 530), where the learned judge says: "There can be no ratification of the indorsement of a note which can relate back so as to make that a transfer at a time earlier than the ratification. The ratification can have no greater effect than would the indorsement itself made at the same time by the payee." This must be the true rule, vide also *Fisk v. Holmes* (41 Maine, 442). And the transfer of this note by delivery without the actual indorsement by the payee, confers no higher rights upon the plaintiff than those of an assignee of a chose in action not negotiable. It was taken subject to all equities between the

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parties and all defences existing before the actual act of ratification. (*Hedges v. Sealey*, 9 Barb., 214; *Savage v. King*, 17 Maine, 301; *Haskell v. Mitchell*, 53 id., 468; *Southard v. Porter*, 43 N. Hamp., 374; *Watson v. Cabot Bank*, 5 Sand., 423.)

The Code has in no respect altered this rule of the law merchant in respect to negotiable paper. (*Richard v. Warner*, 39 Barb., 42.) No one could maintain an action upon this note but Palmer, or some indorsee under him, before the ratification of the indorsement, except under a special, equitable title, on grounds which would leave the original equities open between the parties. No one could acquire in or to said note the rights of a *bona fide* purchaser of commercial paper without the proper instrument and evidence of a commercial title by a genuine indorsement of the payee upon the paper made at or before the time of its transfer. This is the first step in the process of making title to negotiable paper that shall confer greater rights than were possessed by the original holder. The plaintiff clearly had no such title when this suit was commenced; and for this reason, I think the motion for a nonsuit should have been granted, and the exceptions taken to the exclusion of the evidence, showing a defence of the note as between the original parties were well taken.

A new trial should therefore be granted, with costs to abide the event.

New trial granted.

Perrine v. Hotchkiss.

WILLIAM D. PERRINE, Respondent, v. HIRAM G. HOTCHKISS,
Appellant.

(GENERAL TERM, SEVENTH DISTRICT, SEPTEMBER, 1869.)

The defendant took a mortgage from the plaintiff, and gave back an agreement to pay the mortgagor the amount secured, with interest, and also to discharge the interest on the mortgage; the bond and mortgage were then transferred by the mortgagee to the superintendent of the banking department, as security for circulating notes issued to the former, equal in amount to the sum secured, and it had been given for the purpose of such transfer.—*Held*, that the transaction was not usurious.

THIS was an appeal by the defendant from a judgment for the plaintiff on the report of a referee.

The plaintiff sought to recover a sum due on an agreement with the defendant as follows, viz.:

“Received of William D. Perrine, his bond and mortgage for \$920, executed by said Perrine and wife to me, as banker of H. G. Hotchkiss & Co.’s bank, Lyons, to be used by me in my banking operations; and I agree to pay said Perrine said sum of \$920, in circulating notes of said bank, or in currency, it being the face of said bond and mortgage, with interest on the same from this date; and I agree that said Perrine shall not be required to pay the interest on said bond and mortgage, according to its terms, so long as the principal remains unpaid, as aforesaid; but that as often as the same becomes due and payable, according to the terms and conditions hereof, the same shall be canceled by the receipt of said Hotchkiss, banker, as if the same had been actually paid. Dated September 8th, 1860.”

The remaining facts are stated in the opinion.

William Clark, for the appellant.

George F. Danforth, for the respondent.

Present—E. D. SMITH, DWIGHT and JOHNSON, JJ.

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By the Court—E. DARWIN SMITH, P. J. This case comes before us on appeal upon the record, containing exceptions, but without the evidence. The case embraces the pleadings, the report of the referee with exceptions thereto, and a brief statement of the proceedings on the trial, and the judgment.

The referee's report covers the issues made by the pleadings and negatives by implication, the defence of usury set up in the defendant's fifth answer, which was the point chiefly litigated in the action. (*Lefler v. Field*, 50 Barb., 413; and *id.*, 33 Howard, 385; *Nelson v. Ingersoll*, 27 *id.*, 1.) The question presented upon the appeal is, therefore, whether the referee drew the right legal conclusion from the facts found by him. Assuming, as we must, that the evidence did not present a case of usury in fact, or that the referee has found, as matter of fact, that the transaction between the parties was not intended as a device, or contrivance to evade the usury laws, or as a cover for usury, the question for our decision, then, is simply whether, upon the face of the record, a case of usury *per se* is established as a matter of law.

Upon the facts, as found by the referee, the plaintiff executed and delivered to the defendant, his bond and mortgage, for the payment of \$920, in five years, with conditions according to the requirements of the general banking laws of the State, for the purpose of its being assigned and transferred by the defendant to the superintendent of the bank department, in exchange for circulating notes, to be used and put into circulation by the defendant's bank to the amount of the said \$920; and that in consideration thereof, the defendant executed the receipt set forth in said report.

By this receipt, the defendant agreed to pay the plaintiff said sum of \$920 in the circulating notes of said bank, or in currency, with interest on the same from date, and also to pay and discharge the interest on said bond and mortgage as it fell due.

I do not see how we can hold that this contract between the parties as a necessary legal inference, was usurious.

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The statute regulating the interest upon money prohibits the taking of a greater rate of interest than seven per cent upon the loans or forbearance of any money, goods or things in action. (1 Rev. Stat., 772, *et seq.*)

It is essential to constitute usury that there be in effect and intent, a loan or forbearance of money. (*The Dry Dock Bank v. The American Life Insurance and Trust Company*, 3 Comstock, 344.)

Whatever is the form of a particular transaction, there must be in substance and effect a loan of money to bring the case within the terms and intent of the statute. In this case, there was no loan of money. It clearly was not the object or purpose of the agreement between these parties to effect or cover up a loan of money. The transaction may perhaps be regarded as an exchange of securities. The plaintiff executed and delivered his bond and mortgage for the defendant's agreement to pay him \$920 and interest, and pay the interest on his bond and mortgage. An exchange of securities, even though one party makes a profit by the transaction, is not usurious unless connected with a loan of money and designed to cover such loan. (*Dunham v. Dey*, 13 Johns, 40; *Suydam v. Westfall*, 4 Hill, 211; *Ketcham v. Barber*, 4 id., 225.) But I think the transaction may more properly be regarded as an arrangement for the execution and delivery of the said bond and mortgage for the consideration of \$920, the amount of its face to be paid in the currency to be received from the banking department upon the same. The bond and mortgage were made to be, and were, immediately transferred to the superintendent of the banking department in exchange for circulating notes. These notes were to be immediately paid to the plaintiff, for said bond and mortgage. This would make the mortgage a valid mortgage immediately as between the parties. The circulating notes being the notes of the defendant's bank he would get the use and benefit of the circulation in his banking business, and the plaintiff would have to pay his bond and mortgage at maturity. In the meantime, this plaintiff was to pay no interest to the

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defendant on the bond and mortgage. The effect of this arrangement is, that the plaintiff was to have the use of \$920 without interest till his bond and mortgage fell due, and the defendant's bank get the use and profit of the circulation and the use of the bond and mortgage as part of the capital of his bank. This was doubtless the design and intent of the arrangement, and I can see nothing in it necessarily usurious. It was apparently a fair bargain for their mutual profit, and the defendant doubtless expected to make as much out of the circulation as the plaintiff would make out of the money he received before his mortgage fell due. At least there was no loan of money between the parties and none intended, and we cannot say as matter of law that the transaction was designed to cover a usurious transaction and was in law, in violation of the statute. I see no error in the proceedings, in the trial, or in the report of the referee, and I think the judgment should be affirmed.

Judgment affirmed.

WILLIAM O. RAWLEY, Respondent, v. LAWRENCE O. WOODRUFF, Appellant.

2L 419
78 AD 333

(GENERAL TERM, SEVENTH DISTRICT, JUNE, 1869.)

In an action to recover a balance due upon a contract for sale of two separate patented processes, described in a single written agreement, for an entire sum payable in installments.—*Held*, that the vendee was entitled to set-off damages arising out of the vendor's fraudulent representations as to one of the processes, although the other proved to be more valuable than the price paid for both.

APPEAL from judgment entered on report of referee, in favor of the plaintiff.

C. E. Davis, for the appellant.

W C. Rawley, for the respondent.

Present—E. D. SMITH, DWIGHT and JOHNSON, JJ.

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By the Court—Dwight, J. The note in suit was given in part payment for an interest in each of two inventions or processes connected with the manufacture of printing paper. One of the processes was patented; for the other a patent had been applied for. The former was described in the contract of sale as a patent for an "improved apparatus for bleaching paper pulp;" the latter as a patent (applied for) for the purpose of preparing the straw or other material for the bleaching process. The defendant asked to set off damages sustained by him by reason of false and fraudulent representations made by the vendor, Farquharson, in relation to the value of the latter of the two inventions. The referee finds, in substance, that the latter of said inventions or processes was in fact of no value; that if it had been what it was claimed to be, it would have been a very valuable improvement, and worth, if patented, much more than the sum for which this action was brought, and that the defendant gave evidence tending to prove the false and fraudulent representations, alleged, in reference to this process or invention, but that he did not sustain any damage by entering into the contract of purchase, because the other patent was worth more than he agreed to pay for both. In his first conclusion of law, also, the referee finds that if (assuming that) the defendant was induced to enter into the contract of purchase by the fraudulent representations of Farquharson as to the merits of the discovery he was about to patent, he cannot recoup or set off damages, because none have been sustained by him, the evidence showing, on the contrary, that the agreement, as a whole, was very valuable and beneficial to him. In this conclusion of law there can be no doubt the referee erred. It could be arrived at only by adopting an erroneous rule of the measure of damages in actions of this character, viz.: That it is the difference between the actual value of the thing purchased and the price agreed to be paid therefor, whereas the true measure of damages is the difference between the actual value of the

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property and the value which it would have possessed if it had been as represented. (*Muller v. Eno*, 14 N. Y., 597.)

Under this rule, it is no answer to the defendant's demand of set-off to say, that he has received greater value in one of the patents purchased, than the price he agreed to pay for both. He was entitled to have the vendor's representations in respect to *each* of the patents, made good to him. The fact, that one of the things purchased, proves to be of greater value, than the price agreed to be paid for it, does not lessen the damage sustained by him, in the failure of the other to answer the recommendation, under which he purchased it.

It is true, as urged by the respondent, that the referee does not expressly find, that there was any false and fraudulent representation, as to the merits and value of the patent applied for, but he bases his omission to find that fact, in the face of evidence tending to show it, upon an erroneous conclusion, that it was immaterial to the issues in the action. Moreover, in the conclusion of law above noticed, he assumes that fact to be proved. He holds, properly, that fraud and damage must concur, to lay the foundation of the recoupment or set-off demanded, and finding, as he does, that no damage has been sustained, he holds it immaterial whether fraud has been committed or not.

The error of the referee consists, not in the omission to find upon the question of fraud, but in the conclusion of law that, admitting the fraud to be established, no damage is shown.

If the two patents or inventions purchased were together worth less than they would have been if each had been what it was represented to be by the seller, then damage has been sustained by the purchaser to the amount of such deficit in value.

All the facts necessary to establish damage are found by the referee, viz.: 1st. That the patent applied for, if it had proved to be what was claimed for it, would have been worth more than \$5,000; and, 2d. That in fact it was of no value. It remained, therefore, only to find false and fraudu-

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lent representations, by the seller in respect to the value of this invention, to establish the defendant's right to the off-set claimed.

The omission to find upon the fact of fraud might, it is true, have been corrected by motion for a more full report. The error committed consists in the finding that the defendant had sustained no damage.

For this error the judgment should be reversed and a new trial granted.

All concurring.

New trial granted.

JOHN LOW and SARAH BURNSIDE, Respondents v. JAMES
PURDY, Appellant.

(GENERAL TERM, SEVENTH DISTRICT, SEPTEMBER, 1869.)

The heir's title to land is not divested by foreclosure sale under the statute (2 R. S., 545), without service of the notice of sale, on the personal representatives appointed upon the estate of the deceased mortgagor.

If a general guardian makes a purchase in his character as such, he presumptively uses his ward's funds therefor.

And if, on foreclosure sale of his ward's land, he purchases as general guardian, the effect is to merge and extinguish the mortgage, and he can obtain no title by so purchasing, which he can afterward convey without authority from a court of equity.

But if he can show the purchase to have been made with his own funds, he may stand as assignee of the mortgage against his ward until he is reimbursed. Per JOHNSON, J.

Upon recovery in an action for possession of land, interest on the value of each annual rent, which might have been obtained for the land, is allowable by way of damages.

THIS was an action to recover possession of land in Auburn, Cayuga county, and was tried before the court, and a jury, at the Cayuga county circuit.

The plaintiffs proved title, as heirs-at-law, of Dennis C. Low, an infant, deceased, whose title was derived as heir-at-law from Dennis S. Low, deceased, his father; also the issue

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of letters of administration upon the estate of the latter, in Cayuga county, his place of residence at his decease; also the annual value of the rents and profits of the land, above taxes and assessments, and the defendant's possession for some three years, was conceded.

The defendant gave in evidence, a mortgage of the premises, executed by the elder Low in his lifetime, and also certain affidavits and papers in proceedings for a statutory foreclosure thereof, taken during the lifetime of Dennis C. Low, but after the decease of his father, by which it appeared, that notice of sale, in due form, had been served on the said Dennis C. Low, and also upon one Camp (admitted to have been, at the time, his general guardian), in season under the statute, to charge parties entitled to such notice. It further appeared from such proceedings, that a sale of the mortgaged property had been made pursuant to the notice, and the property purchased for the sum of \$600 by Camp, as general guardian, he being the highest bidder therefor. The defendant also proved a conveyance of the premises, after the sale, by Camp "as general guardian of Dennis C. Low," for \$550, to one Palmer, and several other intermediate conveyances from Palmer and others, to one Maillot, who conveyed to him (defendant); and that he took the title, paying a full consideration, and without knowledge or suspicion of any defect in the title, and after having caused searches to be made against his grantor.

The court directed a verdict for the plaintiffs, for possession of the land, and for rents and profits, and interest thereon, from the end of each year, to the time of the trial.

The defendant excepted, and the jury having rendered a verdict in accordance with the directions of the court, appealed

H. V. Howland, for the appellant.

H. L. Comstock, for the respondent.

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Present—E. D. SMITH, JOHNSON, J. C. SMITH and DWIGHT, JJ.

By the Court—JOHNSON, J. Upon the undisputed facts of this case, I am clearly of the opinion that the defendant has no title to the premises in question, as against the heirs-at-law of Dennis C. Low. The mortgage foreclosure and sale under which the defendant claims title were wholly unauthorized and void. It was not a proceeding in accordance with the statute under which it was had. The notice was not served upon any person entitled to a notice under the statute. It should have been upon the administrator of the deceased mortgagor. Service upon the minor heir, and upon his guardian was a nullity, and no person could acquire any title by purchase at such a sale. The statute is explicit. The notice must be served within the time specified "upon the mortgagor or his personal representatives." No other persons are entitled to notice under this proceeding, except subsequent grantees and incumbrancers. Neither the heir nor his guardian is a proper party to such a proceeding, as no provision is made for service upon either, or for any notice to them or either of them whatever. (Sess. Laws of 1844, chap. 346; *Cole v. Moffitt*, 20 Barb., 18; *Anderson v. Austin*, 34 id., 319; *King v. Duntz*, 11 id., 191; *Stanton v. Kline*, 16 id., 9; *Van Slyke v. Sheldon*, 9 id., 278; *Robinson v. Ryan*, 25 N. Y., 320.) A statute authority by which one may be deprived of his estate must be strictly pursued or the proceeding will be void. (*Bloom v. Burdick*, 1 Hill, 130.)

The personal representative mentioned in the statute was, at the time of the proceeding, the administrator, and there was no other person of that description. The heir is not the personal representative of a deceased person under our statute unless he is made either executor or administrator. Heirs and personal representatives are two separate and distinct classes of persons. The sale was therefore, without jurisdiction and no right or title was acquired under it.

But had the sale been regular, under a notice duly pub-

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lished and served upon the administrator, I do not see what right or title Camp, the general guardian of the minor heir of the mortgagor, acquired by virtue of his purchase. The affidavit of the person who made the sale, which is part of the pretended title papers, shows that he purchased, in his character of general guardian of his ward, who was the infant heir and owner of the estate. He did not purchase in his own personal right, but in his capacity and character of guardian. Upon the face of the proceeding the purchase was not for himself, but for another, and the title, if any could have vested in any one, by reason of the purchase, would have vested in the ward, and not in the agent or guardian. The ward, however, being already heir, and owner of the estate in fee, could gain nothing by a purchase at the mortgage sale of his own premises. The only effect of it as to him would be the payment and satisfaction of the mortgage, and the removal of the incumbrance from his estate. Having the inheritance, the mortgage would merge and become wholly extinguished. The guardian had no right to purchase his ward's land for his own benefit and advantage, and the law will not presume that he undertook or intended to do so, especially as the contrary appears on the face of the papers. Had he used his own funds in making the purchase for his ward, he might, I apprehend, have stood as assignee of the mortgage as against such ward until he could reimburse himself out of the estate. But there is no evidence that he did use his own funds, and the legal presumption is the other way. The law presumes, in the absence of proof to the contrary, that he used the funds of his ward. The bid at which the premises were struck off was, it appears, \$600, while the amount claimed to be due at the first publication of the notice was only \$144.82. This last amount, with the cost of advertising and selling added, was all the money actually used, as there does not appear to have been any other claim. The balance of the bid belonged to the ward, of course. The bid was probably made to the

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amount of \$600 on account of competition at the sale. In any event, therefore, Camp could only have held the mortgage for the amount actually paid to extinguish it, and it appears that he took possession of the premises, and held the same after his purchase up to the time of the sale and conveyance by him to Palmer in 1855, a period of between five and six years. The annual value of the rents and profits, over and above taxes and assessments was shown to be ninety-six dollars. The whole amount of rents and profits would be far greater than the amount due on the mortgage and the costs of foreclosure under the statute. As the case stands, therefore, the only right Camp had, at the time of his sale and conveyance to Palmer, was that of general guardian of the infant owner. As such guardian he had no power or authority to sell and convey the real estate of his ward. He could only sell and convey upon the express order and authority of this court in the exercise of its equitable powers, which there is no pretense he had obtained. The conveyance upon its face, shows that he conveyed as general guardian only, and in no other way. This conveyed no title whatever. (2 Kent Com., 228; *Genet v. Tallmadge*, 1 John. Ch., 561; *Field v. Schiefflin*, 7 id., 154; *White v. Parker*, 8 Barb., 52.) He might lease the real estate during the continuance of the relation between them, but had no power to alienate the fee. The defendant is, therefore, wholly without title, and the action to recover possession is well brought, and the plaintiff's right of recovery entirely clear. Camp had no color of title upon the records of the county, and no person could take a conveyance from him *bona fide* as owner of the fee. And every one deriving title through him was bound to take notice of his rights and powers as guardian. The only remaining question is, whether interest was properly allowed upon the annual rents and profits by way of damages. This admits of no doubt whatever. By statute the recovery of mesne profits in such cases is as though the action were assumpsit for use and occupation. (2 R. S., 311, § 53.) The compensation is to be adjusted as upon a contract for rent. (*Holmes v. Davis*,

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19 N. Y., 488.) And in *Jackson v. Wood* (24 Wend., 443), which was a proceeding by suggestion for mesne profits in ejectment in the city of New York, it was expressly held, that interest might be computed upon quarter days, instead of the expiration of the year, as rents were there generally payable quarterly.

A new trial must therefore be denied and judgment ordered for the plaintiffs on the verdict.

New trial denied.

THE BOARD OF COMMISSIONERS OF EXCISE OF CATTARAUGUS
COUNTY, v. CHARLES C. WILLEY.

(SPECIAL TERM, CATTARAUGUS COUNTY, JUNE, 1870.)

County commissioners of excise holding office under the law of April 16, 1857, sued to recover penalties as therein provided; after suit the "act regulating the sale of intoxicating liquors" of April 11, 1870, was passed and the defendant pleaded it as a defence. On demurrer to the answer it was held that the plaintiffs were authorized to prosecute the action notwithstanding the latter law.

The act of 1870 did not altogether abolish the county boards of commissioners of excise then existing. Per MARVIN, J.

It deprived them of the power to grant licenses, but not to sue for the penalties not inconsistent with such act, which are provided for by the act of 1857. Id.

Various provisions of the acts of 1857 and 1870, compared and commented on. Id.

DEMURRER to the answer. The action is brought to recover penalties imposed for the violation of the "act to suppress intemperance and to regulate the sale of intoxicating liquors," passed April 16, 1857, chap. 628. It was commenced January 1, 1870. The defendant by his answer set up the statute of April 11, 1870, entitled "An act regulating the sale of intoxicating liquors," chapter 175.

The question raised is, can this action be continued by the

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plaintiff since the passage of the act of April 11, 1870? The defendant insisted that this act abolished the plaintiff.

Lamb & Vedder, for the plaintiff.

Torrance & Allen, for the defendant.

MARVIN, J. By the first section of the act of 1857 the county judge and the two justices of the sessions, &c., are required to appoint three reputable freeholders, residents of the county, who shall be commissioners of excise for the county, to be known as the board of commissioners of excise. The appointing power in the city of New York was vested in the chief justice of the Superior Court, the presiding judge of the court of Common Pleas, and the recorder, or any two of them. By the second section of the act it is declared that the commissioners of excise shall have power to grant licenses to keepers of inns, taverns or hotels, being residents, &c., to sell strong and spirituous liquors and wines, to be drunk in their houses respectively; and to storekeepers, being such residents, a license to sell such liquors and wines in quantities less than five gallons, but not to be drunk in their shops, &c., &c.

By section 22 the penalties imposed by the act, except in certain specified cases, are to be sued for and recovered in the name of the board of commissioners of excise, and they are to be paid over to the treasurer of the county for the support of the poor of the county.

By the first section of the act of 1870, chapter 175, it is declared that "there shall be a board of commissioners of excise in each of the cities, incorporated villages, and towns of this State." "In incorporated villages they shall consist of three members of the board of trustees, one of whom shall be president, to be annually designated by such board of trustees; and in towns they shall consist of the supervisors and justices of the peace thereof, for the time being respectively. Any three members shall be competent to execute the

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powers vested in any town board, &c. By the second section the mayor of each of the cities, except in New York and Brooklyn, shall appoint the commissioners of excise in their respective cities within ten days after the passage of this act; but in the cities of New York and Brooklyn the mayor shall nominate three good and responsible citizens to the board of aldermen of such cities respectively, who shall confirm or reject such nominations." In case of rejection others to be nominated.

By the fourth section "the board of excise in cities, towns and villages shall have power to grant licenses to any person or persons of good moral character, who shall be approved by them, permitting him and them to sell and dispose of, at any one named place within such city, town or village, strong and spirituous liquors, wines, ale and beer in quantities less than five gallons at a time, upon receiving a license fee, to be fixed in their discretion, and which shall not be less than thirty nor more than \$150." By the sixth section of the act, the act to regulate the sale of intoxicating liquors within the metropolitan police district of the State of New York, passed April 14, 1866, is repealed; and it is declared that "the provisions of the act passed April 16, 1857, except when the same are inconsistent or in conflict with the provisions of this act, shall be taken and construed as a part of this act, and be and remain in full force and effect throughout the whole of this State." The extracts from the statutes of 1857 and 1870, here given, contain all the provisions necessary to enable us to consider the question raised, viz.: Was the board of commissioners of excise, authorized by the act of 1857, abrogated by the act of 1870? In my opinion it was not. The powers of such boards are undoubtedly greatly abridged. The commissioners of excise appointed for the counties can no longer grant licenses to sell strong and spirituous liquors. The authority to grant licenses is, by the act of 1870, vested in other boards created or authorized by the act, and the powers of these city, village and town boards are somewhat enlarged as to the persons to whom licenses may be granted. It is no

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longer necessary that they should be "keepers of inns, taverns or hotels." The boards of excise may now "grant licenses to any person or persons of good moral character who shall be approved by them."

It was not intended by the act to abolish all penalties for the sale of intoxicating liquors in quantities less than five gallons without a license. The act makes no mention of penalties except in section 8, having no reference to the question or subject we are considering.

The statute is silent as to penalties and as to actions, except by its reference to the act of 1857. A statute, or any of its provisions, may be repealed by the enactment of a statute containing provisions in conflict or inconsistent with the prior statute. This is said to be a repeal of the prior statute by implication. Statutes must be consistent, and if they are not, then the latest act is to prevail as the will of the legislature. The repealing of a statute by implication is not favored by the courts; and when the statute is not expressly repealed, the repeal by implication is never applied, if the statutes can, by a reasonable and fair construction, be read together without conflict or inconsistency. The act of 1870 expressly preserves all of the provisions of the act of 1857 not inconsistent or in conflict with the act then created. It was intended to preserve all the penalties given by the act of 1857 which should be in harmony with the provisions of the act of 1870. It was intended that such penalties should be sued for and collected. The act, however, says nothing about them, nor was it necessary to do so, as the act of 1857 contained full and complete provisions touching penalties, and how and by whom they should be recovered.

The question is, is the existence of the boards of commissioners of excise of the counties for the purpose of suing for and recovering penalties, as provided in the act of 1857, inconsistent or in conflict with any of the provisions of the act of 1870? These county boards of commissioners had authority to grant licenses and authority to sue for and recover penalties. By the act of 1870 they are deprived of

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the power to grant licenses, not by any express provisions of the act, but by the creation of other boards authorized to grant licenses; in short, the establishing of a system of licensing inconsistent with the system established by the act of 1857. These county boards of commissioners may well be deprived of the power to grant licenses without affecting in the least their rights to exercise the power of maintaining actions for penalties. This latter power is not conferred upon the new boards nor upon any other person or body, and there can be no conflict between the county commissioners and the new town boards of excise. Each of these boards has its duties and authority, and they may well exist together, each performing its own duties. If the county boards of commissioners are abolished, it will be the duty of district attorneys to prosecute for any penalties imposed by the act of 1857 *exceeding* fifty dollars. It is declared by the Revised Statutes that "it shall be the duty of the several district attorneys to prosecute for all penalties and forfeitures exceeding fifty dollars, which may be incurred in their respective counties, and for which no other officer is by law specially directed to prosecute." (1 R. S., 383, § 91.) The duty is only imposed upon the district attorney when the penalty or forfeiture *exceeds* fifty dollars, and when no other officer is by law specially directed to prosecute. The penalty imposed by the act of 1857 for selling liquors without a license is fifty dollars (§§ 13, 14). Indeed, I think there is no penalty imposed by the act which exceeds fifty dollars. Several smaller penalties are imposed. It cannot be that the legislature intended to abolish all remedy for the recovery of penalties imposed by the act of 1857.

There is one other provision in the act of 1857 to which it may be well to refer. It is, in substance, that if there is a neglect to prosecute for any penalty provided by the act, "any other person may prosecute therefor *in the name of the board of commissioners of excise.*" (Sec. 30.)

There are some penalties given by the act that are to be sued for and recovered by persons other than the board of

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commissioners of excise. A penalty is given to the parent or master of an apprentice, or guardian of a minor, for selling strong or spirituous liquors to a minor under the age of eighteen, without consent, &c. The action is to be brought by the parent, master or guardian, as the case may be (§ 15). See also, for other cases, section 8 and section 19. If actions are not brought for these penalties by the persons to whom they are given and who are authorized to sue, then any person may sue for the penalty *in the name of the board of commissioners of excise*. These provisions are not inconsistent with the provisions of the act of 1870. If they are to be preserved, however, it will be necessary to preserve the county board of commissioners.

I ought, perhaps, to notice certain language in the second section of the act of 1870. This section relates exclusively to the appointment of commissioners in the cities. In New York and Brooklyn the mayor is to nominate and the board of aldermen is to confirm or reject. In the other cities the mayor makes the appointments. The language referred to is: "The present commissioners of excise for the metropolitan district and the commissioners for the counties shall continue to exercise the duties of the office until such appointments, or some one of them, shall be appointed in such cities respectively as herein provided." The language is very ambiguous; but all that was intended by it, so far as the commissioners for the counties are concerned, was that they should continue to exercise their powers of licensing in the city that was in their county until the mayor should appoint the new commissioners or one of them. The act continues: "Any one or more of the commissioners so appointed shall have the power to act as a board of excise for the city in which he shall be appointed until the others shall be duly appointed." No argument can be fairly made from this provision that the commissioners for the counties should cease to exist, or should have no duties to perform, so soon as the new commissioners for the cities should be appointed.

In conclusion, I am satisfied that the board of commis-

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sioners of excise for the counties continue to exist, and that they have power, and it is their duty, to sue for and recover the penalties imposed by the act of 1857 which are not inconsistent with the provisions of the act of 1870. It was not the object of the act of 1870 to interfere with the powers and duties of these county commissioners as to prosecutions for penalties; but the object was to take from them the power of licensing and place such power in other hands, and also to enlarge the power.

The plaintiff must have judgment upon the demurrer, &c.

LEONARD JOHNSON, Respondent, v. JAMES J. BELDEN,
Appellant.

(GENERAL TERM, SIXTH DISTRICT, JANUARY, 1870.)

A canal boat captain, in charge of the plaintiff's boat, having reason to think, and believing, that the gates of a lock were in bad repair and insecure, in the absence of the lock-tender, undertook to take the boat through the lock, as by custom in such case he was authorized to do. He had no notice from the defendant, whose duty it was to keep the lock in safe condition, that it was insecure; boats had been passed through the lock up to the time in question; and it was to be inferred from the evidence, that the captain believed he could pass the boat safely through; the gates gave way, and the boat was injured and delayed for repairs.—*Held*, that the plaintiff was entitled to recover damages on account thereof.

THIS action was brought to recover damages for an injury to the plaintiff's canal boat, at lock number nine, on the Chenango canal, on the 9th day of October, 1867; and for damages for the unloading and detention of the boat, and the detention of plaintiff's servants and team, in consequence of the injury to the boat. The boat was loaded with coal, and was going north. As the boat came near the lock, no lock-tender was there, and the captain of the boat went to the lock, and while preparing it for the reception of the boat the lock gates gave way, because one of them was old and out

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of repair, and the rush of water carried the boat down into the lock, where it was struck and injured; and it was then and there unloaded, and got out and repaired. The defendant was the contractor, employed by the State to put and keep the canal at said lock, and said lock itself, in repair, and proper condition for the passage of boats. The action was tried before a referee, who found that the plaintiff was free from fault or negligence contributing to the injury to the lock or boat; and that one of the lock gates was out of repair; and that the lock gates gave way, and that the boat of the plaintiff was injured by reason of the negligence of the defendant, his agents or servants. He assessed the plaintiff's damages at \$699.69, for which sum judgment was entered and docketed in favor of the plaintiff, with costs, in the office of the clerk of Broome county, on the 9th day of July, 1869. The defendant appealed from the judgment to the General Term of this court.

William Barrett, for the plaintiff.

Charles Mason, for the defendant.

Present—BALCOM, BOARDMAN, PARKER and MURRAY, JJ.

By the Court—BALCOM, P. J. The main point made by the defendant's counsel is, that the plaintiff, by his agent, the captain of the canal boat, contributed to the accident by which the boat was injured and the damage caused, for which the plaintiff recovered. That the captain knew the condition of the lock, and attempted to take the boat through it, knowing that one of the lock gates was so much out of repair that it might give way and injure the boat.

The plaintiff was not with his boat at the time it was injured. The captain of the boat testified that he stopped the boat a short distance above the lock, and then went to the lock, leaving the steersman and the driver of the towing team with the boat. That no lock-tender was at the lock, to prepare it for the boat, when he arrived there. That he had

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previously noticed the lock; had looked at it no great deal; knew it was pretty bad, but did not know how bad it was.

The lock was nearly full of water. The captain opened the paddle gates in the upper lock gates, and was endeavoring to open the upper lock gates when the lower lock gates gave way. The water then rushed down the canal into the lock and swung the upper lock gates together, and they gave way.

The strong current of water in the canal, above the lock, caused by the lock gates going out, brought the boat down at great speed into the lock, where it was broken and damaged. The steersman and driver of the team were unable to hold the boat above the lock, or prevent it from going into the lock and there sticking fast and breaking.

The captain testified that when he made a previous trip with the boat and passed it through this lock, he supposed the lock was in a dangerous condition. That the gates were then so badly out of repair, that he did not know but that they might go out. That they were racked to pieces, so he thought they might go out; and that the gates were not right, they were racked so to pieces. That he had expected they would go out when the upper gates were open, and the full "heft" of water on the lower gates, if they went out at all, and that was why he had considered them dangerous. He also testified that he did not lay back because he expected any trouble with the lock. That the lock-tender lived a mile from the lock, and that he opened the gate because no one else was there to open it.

The evidence showed that about six boats per day had been locked through this lock each way during the season the accident in question occurred, and down to the time the plaintiff's boat was injured.

The lock-tender, and other servants or agents of the defendant, knew that the gates to this lock were not in good repair; but the lock-tender passed boats through the lock every day down to the time of the accident in question, and neither he, nor any other person having any care or superintendence of

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the lock under the defendant, regarded it very hazardous to use it as it was. They had risked the passing of boats through it every day. But it was their duty to examine it, and put it in proper repair, and make it safe and secure for the passage of boats, or give notice that it was unsafe. And the evidence clearly shows they were guilty of culpable negligence in omitting to do so.

It cannot be said that the captain of the boat was guilty of any negligence in attempting to open the lock gates or pass the boat through the lock because of the absence of the lock-tender, or from the way or manner he did any act at the lock. Nor was there any negligence on the part of the steersman of the boat, or driver of the team that towed the boat. The boat was stopped at a proper distance above the lock, and the steersman and driver did all they could to prevent the boat running into the lock after the lock gates went out. And I am of the opinion the evidence of custom touching the opening of the lock-gates in the absence of the lock-tender, showed that the captain of the boat had the right to attempt to lock the boat through the lock in the absence of the lock-tender. There was only one lock-tender employed by the defendant to attend six locks, and the distance between the extreme ones of the six was one mile and a quarter. The lock-tender was at his house, about one mile from the lock at the time the boat came to it. And he testified, when he was not at the lock boatmen locked their own boats through it.

The facts show that there was no fault on the part of the captain of the boat, or his steersman or driver, unless the captain was chargeable with contributory negligence by reason of his knowledge of the condition of the lock or lock gates, and should be deemed culpable for attempting to pass the boat through the lock in the condition the lock-gates were.

It is probable that the captain had some doubt as to the sufficiency of the lock-gates. But I think the just inference from the evidence is, that he believed he could pass the boat safely through the lock when he attempted to do so. The

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lock and gates had been trusted by the agents and servants of the defendant, and no notice had been given or was put up to warn him that the lock was unsafe, as there should have been if it was so much out of repair that boats could not be safely taken through it. It was not the duty of the captain to make a careful examination of the lock or the lock-gates, or to test the strength or sufficiency of either, before proceeding to prepare the lock for the passage of the boat.

If the captain suspected or feared the lock was not perfectly sound or entirely safe, it did not make him guilty of such imprudence as to relieve the defendant from liability for his culpable negligence by and through his agents and servants. The captain, notwithstanding his previous knowledge of the lock, had the right to presume that the lock-tender had full knowledge of the condition of the lock and lock-gates, and that the same were deemed safe and secure for the passage of boats by the lock-tender, and by the defendant and his other employes, or that a notice would have been put up warning boatmen that it was dangerous to pass boats through the lock.

JOHNSON, J., in delivering the opinion of the court, in *Newson v. The N. Y. Cen. R. R. Co.* (29 N. Y. Reps., 390), said: "The law will never hold it imprudent in any one to act upon the presumption that another in his conduct will act in accordance with the rights and duties of both, even though such other has once conducted himself in a contrary manner." (See *Ernst v. Hudson River R. R. Co.*, 35 N. Y. Reps., 9 and 28.) It is laid down by Shearman & Redfield, in their work on Negligence, at page 23: "If the defendant has, by his own act, thrown the plaintiff off his guard, and given him good reason to believe that vigilance was not needed, the lack of such vigilance on the part of the plaintiff is no bar to his claim." (See *Penn. R. R. Co. v. Ogier*, 35 Penn. St. Reps., 60.) On pages 30 and 31, in the same work, it is asserted: "As there is a natural presumption that every one will act with due care, it cannot be imputed to the plaintiff as negligence that he did not anticipate culpable negligence

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on the part of the defendant. Nor even where the plaintiff sees that the defendant has been negligent, is he bound to anticipate all the perils to which he may *possibly* be exposed by such negligence, or even to refrain absolutely from pursuing his usual course on account of risks to which he is *probably* exposed by the defendant's fault. Some risks are taken by the most prudent men; and the plaintiff is not debarred from recovery for his injury if he has adopted the course which most prudent men would take under similar circumstances."

The foregoing rule is sustained by the case of *Clayards v. Dethick* (12 Queen's Bench Reps., 439), where it was held that: "The defendant is not necessarily excused merely because the plaintiff knew that some danger existed through the defendant's neglect, and voluntarily incurred such danger. The amount of danger, and the circumstances which led the plaintiff to incur it, are for the consideration of the jury. Therefore, where the plaintiff, in full view of obstructions left in the road by the negligence of the defendants, attempted to lead his horse over them, and the horse fell and was killed, it was held to be a question for the jury whether the plaintiff was culpably negligent or not."

In *Randall v. The Proprietors of the Cheshire Turnpike* (6 New Hampshire Reps., 147), the defendants' toll bridge became unsafe from the gradual decay of the timbers; but there was no open and visible danger in passing, and it was held that the defendants were responsible for the sufficiency of the bridge so long as they continued to take toll and keep the bridge open to the public, although notice was given to those who passed that there was danger. The plaintiff in that case, with his horses and wagon, fell through the bridge while passing it, and were injured, and the court held that it was not enough that the defendants gave notice that there was danger. But in order to have exonerated themselves, they should have given notice that there was danger *for which they would not be answerable*, and must have refused to take toll.

These authorities show that the knowledge the captain

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of the boat had of the lock and lock-gates, and that he considered them dangerous, did not establish, as matter of law, that the plaintiff was chargeable with contributory negligence and debarred from recovering his damages. And I am of the opinion that the risks that the captain took, in attempting to pass the boat through the lock, were such as most prudent men would have taken under the circumstances.

My conclusion is, that the finding of the referee was correct, that the plaintiff was not chargeable with negligence that contributed to the injury to the boat; in other words, that the captain was free from fault, and that such finding is conclusive upon the defendant.

It is unnecessary to notice any other question in the case, for I understood the defendants' counsel to rely entirely, for a new trial, upon the point that the captain of the boat was guilty of such imprudence or contributory negligence as to be a bar to the action.

If these views are correct, the judgment in the action should be affirmed with costs.

So decided.

ALPHONZO STONE, Superintendent of the Poor of the County,
of Cortland, v. LEWIS A. BURGESS.

(GENERAL TERM, SIXTH DISTRICT, JANUARY, 1870.)

An order for the support of a poor person, under 1 R. S., 614, § 1, *et seq.*, is not invalid, because two out of five children of such person, are directed to furnish the support, nor because they are directed to contribute thereto, in unequal amounts.

The liability of the children charged by the order is several, and either is liable on default, in an action to recover the payment required of him by the order.

An action also lies for the costs awarded on granting such order, against the parties severally charged therewith under section 6.

In counties where all the poor are a charge upon the county, the action is properly brought by the superintendent of the poor (§ 13).

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THIS action was brought upon an order, made by the Court of Sessions, of Cortland county, on the 1st day of May, 1865, which required the defendant and his brother, Moreau D. Burgess, to relieve and maintain their father, James Burgess, and to pay the plaintiff, as county superintendent, and his successors in office, three dollars weekly for such purpose, as follows: The defendant to pay \$1.91 each week, and Moreau D. Burgess to pay \$1.09 each week, to be applied to the relief and maintenance of the said James Burgess, until the further order of the court, or until the death of the said James Burgess. The order also required, that within ten days after service of a copy of it, the defendant should pay the sum of \$19.09, and that the said Moreau D. Burgess should pay the sum of \$10.91, to the plaintiff as county superintendent, for the costs and expenses of the application for the order, and of the proceedings therefor.

The order showed that James Burgess was a poor person, who was old and decrepit, so as to be unable by work to maintain himself, residing in the town of Marathon, in the county of Cortland. It also showed that he had five children. But it did not show that either of his children, except the defendant, and Moreau D. Burgess, was of sufficient ability to relieve and maintain him, or to contribute any sums for that purpose.

The action was commenced on the 28th day of October, 1865. It was tried at the Cortland circuit in June, 1866. The plaintiff claimed, that he was entitled to recover the \$19.09 costs, which the order of the Court of Sessions required the defendant to pay him, with \$1.45 interest thereon, and for weeks enough, at \$1.91 per week, to amount to \$40.12, making \$69.66 in all. But it appeared that the defendant had paid \$7.65, which left a balance of \$62.01, which the plaintiff was entitled to recover, if his entire claim was good in law, upon the evidence. The judge charged the jury, that the plaintiff was entitled to their verdict for sixty-two dollars; to which the defendant excepted. The defendant asked the judge to charge the jury, that he was not liable in

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the action for the costs granted in the order. The judge refused so to charge; to which refusal the defendant excepted.

The evidence showed that neither the plaintiff, nor the overseer of the poor of the town of Marathon, had paid or incurred any expense for the support and maintenance of James Burgess, except as follows, to wit: Soon after the order was made, the defendant and his brother, Moreau D. Burgess, made an arrangement with the overseer of the poor of the town of Marathon, which was approved by the plaintiff, that James Burgess should first live with, and be supported for a time by, Moreau D. Burgess, and that then he should live with, and be supported awhile by, the defendant. James Burgess lived with Moreau D. Burgess, and was supported by him all, or nearly all, the time until this action was commenced. The defendant paid \$7.65 to the overseer of the poor for the first thirty days during which Moreau D. Burgess supported his father James, which money the overseer of the poor paid over to Moreau D. The defendant was maintaining his father at his own house at the time of the trial, and it may be inferred from the case that the defendant had supported his father for a considerable period previous to that time.

The overseer of the poor testified that a part of the arrangement between the defendant and his brother, Moreau D., was, that while one kept their father the other was to pay. That the defendant was to pay \$7.65 for every thirty days he remained with Moreau D.; and when the defendant maintained him Moreau D. was to pay \$1.09 per week.

The defendant testified that he did not know whether anything was said in the arrangement as to what the contract imposed upon him and his brother Moreau D., respecting the payment of money. That he and Moreau D. were to contribute to the support of their father, according to the sums required by the order.

The plaintiff did not understand the arrangement to dispense with the payment of the money specified in the order. But it was his understanding, as well as that of the overseer

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of poor of Marathon, that the money required by the order should be paid.

The defendant testified, that at the end of the first thirty days, he gave Moreau D. notice, through the overseer of the poor, that he would be ready to take his father at the end of the next thirty days; and that he then was ready to keep him, and had been ever since that time. And the overseer of the poor testified that he gave that notice to Moreau D.; and that he informed the plaintiff of the arrangement after it was made, who approved of it. The arrangement and notice were not in writing.

The defendant asked the judge to submit to the jury the question, whether the contract was not fulfilled upon the part of the defendant. The judge refused to do so, and the defendant excepted.

The defendant asked the judge to submit to the jury, whether the fair interpretation of the contract was not, that the defendant could keep his father after the end of thirty days in full satisfaction of the terms of the order; which the judge refused to do, and the defendant excepted.

The jury rendered a verdict in favor of the plaintiff for sixty-two dollars. Judgment was entered thereon in his favor with costs, and the defendant appealed. No question has been raised that the case is not properly before the General Term. But there is not any notice of appeal in the case.

Ballard & Warren, for the plaintiff.

Waters & Waters, for the defendants.

Present—BALCOM, BOARDMAN, PARKER and MURRAY, JJ.

By the Court—BALCOM, P. J. The presumption from the order of the Court of Sessions is, that three of the five children of James Burgess were unable to contribute toward his support, and that the defendant ought to pay more for that purpose than his brother, Moreau D. Burgess, by reason of a difference in their abilities.

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No question was raised on the trial as to the validity or regularity of the order; but it is now claimed by the defendant's counsel that the order was void, because it did not require all the five children of James Burgess to relieve and maintain him, and for the reason that it compelled two of his relatives of the same degree, namely, two of his sons, to contribute unequally for his maintenance.

James Burgess, being old and decrepit, so as to be unable by work to maintain himself, it was the duty of his children, who were of sufficient ability, at their own charge, to relieve and maintain him in such manner as should be approved by the overseer of the poor of the town of Marathon, where the old man, James Burgess, was. (1 R. S., 614, § 1.) In those counties where all the poor are a charge upon the county, the superintendents of the poor are to act instead of the overseers of the poor. (Id., p. 616, § 13.) And it is proper to infer that all the poor in Cortland county are a charge upon that county, for the reason that the superintendent procured the order in this case and brought this action, and no objection has been taken that the overseer of the poor of Marathon should have obtained the order and brought the action instead of the superintendent. (See 1 R. S., 615, § 7.)

The right to apply to the Court of General Sessions of the Peace of Cortland county for an order, and of that court to make one, and require the children of James Burgess, against whom the order was made, to pay the costs and expenses of the application, was conferred by sections 2, 3, 4, 5 and 6 of the Revised Statutes. (1 R. S., pp. 614 and 615.) By section 3, the Court of Sessions "shall order such of the relatives aforesaid of such poor person *as appear to be of sufficient ability* to relieve and maintain such person, and shall therein specify the sum which will be sufficient for the support of such poor person, to be paid weekly." Section 4 authorizes the Court of Sessions to "direct two or more relatives of different degrees to maintain such poor person," and to "prescribe the proportion which each shall contribute for that purpose." That section also authorizes the Court of Sessions,

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when it shall appear that the relatives liable to maintain a poor person are not of sufficient ability wholly to maintain such poor person, but are able to contribute something, to direct the sum, in proportion to their ability, which such relatives shall pay weekly for that purpose. And I must say that a careful reading of all the statutes referred to, satisfies me that the order of the Court of Sessions in this case was valid; and the evidence shows it was obtained upon due notice, and that it was in all respects regular. It was duly served on the defendant and his brother, Morcan D. Burgess.

The statutes expressly authorize the plaintiff to maintain this action, to recover the sum the order required the defendant to pay weekly, for the support of his father. (1 R. S., 615, § 7; id., 616, § 13.)

The Court of Sessions is authorized to enforce the payment of such sum, and the payment of the costs and expenses of the application for the order, "by process of attachment." (1 R. S., 615, § 6.) But neither section 7 nor section 13, above cited, authorizes the recovery of such costs and expenses by action. The order, however, respecting such costs and expenses, was equivalent to a judgment that the defendant pay \$19.09 to the plaintiff, within ten days after service of a copy thereof. And I am of the opinion that sum could have been recovered in the old action of debt. (See 1 Cow. Tr., 2d ed., 38 to 41; Gra. Pr., 2d ed., §4.) And I am unable to see any valid objection to the recovery of such costs and expenses in this action under the Code.

The only other question in the case, is whether the defendant established a defence to the recovery of the \$1.91, which the order required him to pay weekly, to be applied to the relief and maintenance of his father. The statute is, if any relative, who shall have been required by such order to relieve or maintain any poor person, shall neglect to do so, in such manner as shall be approved by the overseers of the poor of the town where such poor person may be, and shall neglect to pay to such overseers (in this case the superintendent) weekly, the sum prescribed by the court for the

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support of such poor person," the action may be maintained. (1 R. S., 615, § 7; id., 616, § 13.) Now, as I understand the evidence in the case, the plaintiff recovered the weekly sum, only for the time the defendant did not relieve or maintain his father, prior to the commencement of the action. And the statute makes him liable to pay the sum of \$1.91, weekly, as fixed by the order, for every week he neglects to relieve or maintain his father. It also makes his brother, Moreau D., liable to pay the sum of \$1.09 weekly, as specified in the order, for each week he neglects to relieve or maintain his father. The order fixed the expense weekly, of relieving, and maintaining James Burgess, at three dollars; and the liability of the defendant, and of Moreau D., to contribute toward that expense, is several, and not joint. It is not necessary, that both of them should neglect to relieve or maintain their father, to render the one who does not relieve, or maintain him, liable to pay the sum the order requires him to pay for that purpose. The statute is, "if *any* relative," etc., shall neglect, etc., the action may be maintained against him, provided he does not pay the sum weekly prescribed by the court. (1 R. S., 615, § 7.)

If the foregoing views are correct, no error was committed on the trial, and the judgment in the action should be affirmed with costs.

So decided.

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THEODORE E. HART v. HIRAM J. MESSENGER and others.

(GENERAL TERM, SEVENTH DISTRICT, SEPTEMBER, 1869.)

The plaintiff, an individual banker having turned out worthless notes to certain of his depositors in payment of their claims, fraudulently representing the notes to be good, sold his banking business, and took from the purchaser a bond of indemnity against all existing liabilities of the bank; after the sale the depositors sued him for the fraud; the purchaser being notified, defended, and judgment was recovered in the suit for the amount originally due the depositors; the plaintiff paid the judgment and brought an action on the bond to recover the amount paid.—*Held*, that the judgment was recovered upon a personal claim against the plaintiff, and the action was not maintainable.

The action for the fraud, also necessarily affirmed the receipt of the notes as payment and satisfaction of the depositors' claims, and payment of the judgment therein satisfied and extinguished them.

The depositors' claims having existence against the bank at the date of the bond, if at all, by reason of the plaintiff's fraud, he could not maintain an action based upon such fraud.

Held, further, that the plaintiff was not entitled to be subrogated to the rights of the plaintiffs in the judgment, as against the bank by payment of the judgment.

THIS was a motion for a new trial, heard, in the first instance, at General Term.

The action was upon a bond of indemnity executed by the defendant, Messenger, as principal, and the other defendants as sureties, upon purchase by the former of the plaintiff's interest in the Canandaigua Bank, and it sought to recover the amount of a judgment paid by the plaintiff, and recovered against him at the suit of certain depositors with the bank for deposits made before the plaintiff's sale. The bond was conditioned as follows, viz. :

"The condition of this obligation is, that whereas the said H. J. Messenger has this day purchased of the said T. E. Hart his interest, and all the assets, fixtures, etc., of the bank of Canandaigua. Now, therefore, if the said H. J. Messenger shall at all times keep the said Hart clear from all liabilities and save him, the said Hart, harmless from all claims

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whatsoever, against the said bank of Canandaigua, both of bills or notes of said bank, deposits and liabilities of all kinds, then this to be void and of no effect ; otherwise to remain in full force and virtue."

The plaintiff proved that in October, 1857, he, together with one Antis, were the proprietors of the Canandaigua Bank as partners, and that in December of the same year he having purchased the interest of Antis in the business, sold such interest to the defendant, Messenger, who became thereupon his partner, and so continued until April, 1863, when he (plaintiff) sold out his interest to Messenger, and thereupon took the bond of indemnity before mentioned.

The plaintiff also gave in evidence the judgment roll in an action by one Bushfield, as executrix, against Hart and Antis ; from which it appeared that in December, 1857, the bank being indebted to certain depositors for moneys left on deposit therein, they (Hart and Antis) had induced such depositors to take certain notes which they represented to be good, in payment of their claims, and that the judgment was recovered for the amount of such claims, on the ground that the representations made as to the notes were false and fraudulent.

The plaintiff also proved, that on the commencement of the last named suit he had notified the defendants in this action, and that the defendant, Messenger, had agreed to take care of the suit, and that he (plaintiff) took no part in the defence. Also, that he had paid the judgment recovered against himself and Antis, after requesting the defendants to do so and their refusal. Also, that previous to the execution of the bond, the plaintiff and defendant, Messenger, had talked about the subject-matter of the suit afterward brought, and in which the judgment was subsequently recovered against the plaintiff, and that Messenger knew of the claims of depositors, and that the plaintiff had then told Messenger that he believed the notes turned out to the depositors were good, and that there had been no false or fraudulent representations made in respect to them ; also, that he supposed the notes were good, and that Messenger knew that there were

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claims made by the holders respecting fraudulent representations as to the notes.

The plaintiff also offered to give further evidence to show that the holders of the notes offered to return them to the bank with Messenger's knowledge, and to rescind the payments on the ground that they were worthless, and that they demanded payment of their deposits, and that the claims were frequently matters of conversation between the plaintiff and Messenger while they were partners. This evidence was objected to by the defendants and excluded by the court, and the plaintiff excepted. The court nonsuited the plaintiff, who obtained a stay of proceedings, etc., etc.

E. G. Lapham, for the plaintiff.

H. O. Cheesebro, for the defendants.

Present—DWIGHT, JOHNSON and J. C. SMITH, JJ.

By the Court—JOHNSON, J. The demand upon which the action was brought, was not within the terms or the spirit of the defendant's bond. By the terms of the bond, the defendant and his sureties agreed to "keep the said Hart clear from all liabilities, and save him harmless from all claims, whatsoever, against the said bank of Canandaigua, both of bills or notes of said bank, deposits and liabilities of all kinds." The only question, therefore, upon the trial was, whether the plaintiff had any legal claim against the bank. If he had any, it must have sprung out of the fact that Sarah Busfield, as executrix, had, in a certain action, recovered a judgment against the plaintiff. No other foundation for the plaintiff's claim was alleged or pretended. But this judgment, as clearly appears, was recovered in an action for a fraud practiced by the plaintiff and his former partner, Antis, in turning out and transferring certain promissory notes to the plaintiff's testator and his assignors, in payment and satisfaction of claims they then had against said bank, for moneys before then deposited to their credits respectively.

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The action upon which this judgment was obtained was not, therefore, for a claim against the bank, but upon a personal claim against this plaintiff and his said former partner for the fraud in procuring the satisfaction and discharge of the claim against the bank. That action necessarily affirmed the transaction of receiving the notes in payment and satisfaction of the claims against the bank for the moneys deposited by the owner of the cause of action. It was in law an election to affirm the bargain and seek redress by means of the cause of action arising from the fraud.

The defendant's bond, in its broadest and most comprehensive scope, cannot be taken or held to include claims by former dealers with the bank, against the plaintiff for frauds practiced by him in his dealings with them, either as banker or as the officer or agent of such bank. When the bond in question was given, the claims of these depositors appeared to be satisfied upon the bank books, and it was represented by the plaintiff, as he confesses, to the defendant that they had been so satisfied without any fraud on his part. It is clear, therefore, that these claims were not within the contemplation of the parties to the bond. Apparently no such claims existed when the bond was executed, and it is clear that no such claims have been established against the bank by the former action against the plaintiff. But even if we could hold that this former action against the plaintiff established the fact that these depositors still had claims unsatisfied against the bank at the time of the making of the bond in question, it is clear enough that they had no such claims when this action was commenced. The judgment recovered against the plaintiff, for the deceit, had then been paid, and the payment of that judgment necessarily extinguished the original claim for the moneys deposited. But independent of the question of the judgment and the payment thereof, if the claims of the depositors had any legal existence at or after the execution and delivery of the bond as against the bank, they had such existence solely by reason of the plaintiff's fraud; and the law does not give him a right of action

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against another, which has its sole foundation in his own fraudulent conduct. The maxim "*ex dolo malo non oritur actio*," applies to this case. If the claims, being apparently extinguished when the bond was executed, were brought within the terms of such bond, by the plaintiff's fraud, he cannot be allowed to enforce the obligation in respect to such claims. But if this were not so, the claimants never undertook to enforce any claim against the bank. Another, and quite different claim, was enforced against the plaintiff. He had incurred a liability by means of his fraudulent practices, and the owner of those claims chose to enforce that liability instead of the other.

The payment of that judgment by the plaintiff does not operate as an assignment of those claims against the bank, but extinguishes them. He did not stand in the position of surety for the defendant, as to anything existing by reason of his own fraud or springing from it. There can be no subrogation in such a case. Such claims are not kept on foot to enable the wrong-doer to enforce them against another. Equity can never interpose to presume claims of a character which it would be inequitable and against conscience to enforce. By paying the judgment against him, the plaintiff has simply made the atonement and satisfaction which the law prescribes for his fraud, and neither law nor equity, in such a case, gives him any remedy over, against any other person. The nonsuit was, therefore, clearly right, and a new trial must be denied.

Now trial denied.

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NANCY M. CARPENTER v. WILLIAM P. OTTLEY and MILTON
H. OTTLEY.

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61h	458

(GENERAL TERM, SEVENTH DISTRICT, SEPTEMBER, 1870.)

In an action of trespass, for entering and cutting standing timber, the defendant may interpose, as a defence, a right as the equitable owner of the timber.

A deed of timbered land, with covenants against the grantor's acts, was made and delivered to the plaintiff, who paid for the land only, and promised, without writing, to convey the timber with the right to enter and cut the same to one with whom the grantor had an unwritten contract for its sale, and who afterward paid the latter for the same.—*Held*, that the grantor's vendee of the timber was the equitable owner thereof, and was not liable to the plaintiff, who had refused performance of the unwritten promise, for entering under such promise and cutting the timber.

The plaintiff having acted by an agent, in negotiating the purchase and in taking the conveyance,—*Held*, that the arrangements made by such agent, upon delivery of the deed and after the contract of sale for the taking of the timber, were adopted by the plaintiff on acceptance of the deed, and became part of the *res gestæ*.

Held, further, that evidence of the agreement in respect to reservation of the timber, and for its conveyance by the plaintiff, did not tend to vary or contradict the covenants of the deed.

And that the plaintiff was estopped from setting up the statute of frauds.

THIS was an appeal from a judgment entered on the report of a referee.

The action was brought to recover damages for an alleged trespass upon the plaintiff's premises. On the trial certain evidence was admitted under objection by the plaintiff and her exception, to show an agreement, on the part of the plaintiff's agent, who negotiated the purchase of the land in question and conveyance to her, after completion of the contract of sale, and at the time of the conveyance mentioned in the referee's report, to allow an entry upon the land, for the purpose of a removal of the timber therefrom. The referee found for the defendants upon facts stated by him as follows, viz.:

“That for several years prior to April 23, 1863, the defend-

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ant, William P. Ottley, was seized and possessed of the following described premises, viz. (describing them):

“That on the 23d day of April, 1863, Harlow Munson, sheriff of Ontario county, pursuant to a judgment of foreclosure and sale ordered by this court, sold and conveyed said premises to one Nathan Oaks. That on the 25th day of May, 1863, said Oaks and wife conveyed the premises described in the complaint in this action (being a part of the premises so purchased by said Oaks) to the plaintiff, who has been in the possession thereof ever since.

“That on the 6th day of February, 1864, said Oaks and wife, pursuant to a previous agreement made so to do, conveyed the balance (being the north part of said premises so purchased by him at said sheriff's sale, and consisting of about fifty-two acres) to the defendant, Milton H. Ottley. That on that portion of said premises so conveyed to said Milton H. Ottley, there was no wood or timbered land. That on the south part, on the forty acres so conveyed to said plaintiff, was about thirteen acres of wood or timbered land. That shortly previous to the said sheriff's sale, there was a verbal agreement or understanding between said Oaks and said Ottley that in case he, said Oaks, became the purchaser of said premises herein firstly described at said sheriff's sale, that then and in that event he, said Oaks, would deed and convey to the defendant, Milton H. Ottley, that portion of said premises, which he afterward did convey to him on the 6th day of February, 1864, provided said William P. Ottley would find a purchaser and negotiate a sale of the south forty acres of said premises—being the forty acres described in said complaint in this action—at the price of eighty-five dollars per acre, including the wood and timber thereon, or sixty-five dollars per acre reserving the wood and timber thereon.

“That thereupon said William P. Ottley did proceed to find such purchaser and negotiate a sale of said forty acres, and did shortly negotiate a sale of said forty acres to the plaintiff, upon the following terms, viz: At the price of sixty-five dollars per acre, reserving all the wood and timber then

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thereon (excepting three or four shade trees), and the sugar-house and saw-mill thereon, with the right of ingress and egress to and from the same for and during the term of three years from the date of the deed for said forty acres, in and during which to enter, cut and take away said wood, timber, sugar-house and saw-mill, for the use and benefit of said Milton H. Ottley; and which agreement was verbal.

“That said terms of sale and such sale were reported to said Oaks, who became purchaser of all said premises as hereinbefore stated. That said Oaks approved and consummated such agreement and sale to and with the plaintiff; and on the next day after said Oaks became such purchaser, said William P. Ottley, acting for said Oaks and said Milton H. Ottley, and said plaintiff by her husband, Calvin G. Carpenter, who acted for and on behalf of the plaintiff, in all he did in respect to the purchase of said forty acres, proceeded and employed a surveyor, Lewis Peck, to run off and survey off the said forty acres, and did do so, they, the said William P. Ottley, and said Calvin G. Carpenter assisting as chain-bearers in so doing; and then employed said Peck to draw a deed to the plaintiff for said forty acres. That when said deed was about being made out, at the same time, the terms and conditions of such sale, and the reservations in regard to the wood and timber, sugar-house and saw-mill, were stated over to said Peck as he was about to then prepare said deed, that the same might be included therein; and thereupon, at the suggestion of said Peck that said reservations would encumber the record, and by his advice, it was then and there agreed that said reservations in relation to said wood and timber, sugar-house and saw-mill, and time of getting off the same, should not be inserted in the said deed, but that a separate writing, containing the same, should be subsequently executed by the plaintiff to said Milton H. Ottley; and under these circumstances, and for this reason, the said deed to said plaintiff; was executed and delivered by Oaks and the plaintiff without containing said reservations, and upon the express assurance by said plaintiff, by her said hus-

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band and agent, that it would make no difference, "would all be right," and that defendant can "go on and cut," and take off said wood and timber, etc.

"That in the fall of 1863, the defendants did enter and proceed to cut and take away said wood and timber, and continued so doing until the 6th day of February, 1866, each year, when the plaintiff forbade them from cutting or taking away any more of said wood or timber. That during all the time from May 2d, 1863, to February 6th, 1866, the plaintiff knew said defendants were at work taking off said wood and timber, and made no objections thereto.

"That said defendants, on being so forbidden by the plaintiff, by her said husband, immediately ceased to cut or take away more of said wood or timber.

"That on the 9th day of February, 1866, this action was commenced. That at the time the defendants were so forbidden by the plaintiff, they had cut and taken away nearly all the wood and timber that were on said premises, at the time the deed was made to her, except the shade trees specified.

"That on the sale of the remainder of said premises, by said Oaks to Milton H. Ottley, it was agreed that said Milton H. Ottley was to have all the wood, timber, and sugar-house and saw-mill, so reserved in the agreement with said plaintiff; and in consideration thereof said defendant, Milton H. Ottley, was to secure and pay said Oaks for the thirty-two acres so sold and conveyed to him, \$800 more, or in addition to what he was to do in case the said wood, timber, sugar-house and saw-mill, were not reserved for his benefit; and said Milton H. Ottley actually paid, or secured to be paid, said sum of \$800, in consideration of such reservation for his use and benefit.

"That the defendants, at different times after the execution and delivery of said deed to the plaintiff, requested her to execute and deliver to said Milton H. Ottley, the separate writing containing said reservations in relation to said wood, timber, sugar-house and saw-mill, pursuant to said agree-

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ment; but she refused or neglected to do so, though one was prepared by the defendants for her to sign, and presented to her for that purpose. That all the wood and timber cut or taken away by said William P. Ottley, was cut for and at the direction of said Milton H. Ottley; and all cut or taken away by said Milton H. Ottley, or by either of the defendants, was cut and taken away under, and pursuant to the agreement made with the plaintiff, at the time she purchased said premises, and under the reservation then made in relation to the same."

W. F. Diefendorf, for the appellant.

S. Baldwin, for the respondent.

Present—DWIGHT, JOHNSON and J. C. SMITH, JJ.

By the Court—JOHNSON, J. It is settled, upon abundant authority, that a defendant, under section 150 of the Code, may set up an equitable defence to an action in the nature of a legal action, and defeat such action thereby, if he can establish such defence. (*Dobson v. Pearce*, 12 N. Y. R., 156; *Crary v. Goodman*, id., 266; *Phillips v. Gorham*, 17 id., 270.)

A recovery of property or the value thereof by a plaintiff who has the mere legal title, will not be allowed against a defendant who has the equitable title to such property, and who might in an action against the plaintiff, to compel a specific performance, compel the latter to convey or transfer such legal title to the defendant. The defendant must, of course, set up his defence, in such a case, by way of answer, and establish it by his evidence. If, therefore, the defendant, Milton H. Ottley, under whose authority the timber in question was taken, could have compelled the plaintiff to convey to him the timber, in an action for that purpose, the decision of the referee is right upon the merits. I do not see but that the facts found by the referee are warranted by the evidence in

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the case before him. The case, then, upon the facts is briefly this: The two parcels of land owned by the plaintiff and the defendant, Milton H. Ottley, respectively, were originally a single farm. The plaintiff purchased her parcel without the timber, then growing thereon, and upon an agreement that the same should be reserved when the land was conveyed to her. The defendant, Milton H. Ottley, purchased the parcel of said farm occupied by him, and in addition thereto the timber in question standing on the land purchased by plaintiff, and agreed to pay, and did in fact pay, or secure to be paid, \$800 over and above the price of his land for the timber aforesaid. When the plaintiff's land was conveyed to her, it was suggested and agreed, that, instead of reserving the timber in her deed, according to the original agreement and understanding, the deed should be made without reserving the timber, and the plaintiff should thereafter, upon request, execute to the said defendant an instrument in writing, conveying him the timber in question. This was suggested by the scrivener who drew the plaintiff's deed, as a more convenient way of carrying out the original bargain, and adopted by the grantor and the plaintiff. This writing the plaintiff subsequently refused to execute, on request. This action is for trespass in taking that timber, and the plaintiff claims treble damages under the statute.

Upon these facts it is obvious that the defendant, Milton H. Ottley, was the equitable owner of the timber, and that the plaintiff held the legal title as his trustee only. Milton H. could have compelled her to execute the writing, giving him the right to the timber, in an action for a specific performance, though he was not a party to the agreement. It was made for his benefit, and was to be performed to him. The consideration moved from him. It is now well settled that such a promise may be enforced in an action legal in form, as it always could have been in equity. The case upon this point is so clear upon the merits, that the other questions need not be examined at length.

The original contract of sale to the plaintiff was made

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with her husband, who acted as her agent. The price at which the premises were offered was eighty-five dollars per acre with the timber included, or sixty-five dollars per acre with the timber excluded and reserved. The latter proposition was accepted. The agreement also in regard to the deed, and the execution of the writing by the plaintiff to the defendant, Milton H. Ottley, for the timber, was made with the plaintiff's husband, who claimed to be acting as her agent. The deed, after it was made out in pursuance of such understanding and agreement, was delivered to the husband for the plaintiff. The plaintiff, having accepted the deed and taken all the benefits and advantages of the bargain and the arrangement, made in her name and behalf, must be held to have ratified what her agent did in her behalf, in making the bargain and in taking the conveyance, and to have adopted it. She cannot enjoy the fruits of the transaction without adopting all the instrumentalities employed by the agent in bringing it to a consummation. (*Bennett v. Judson*, 21 N. Y. R., 238.) The arrangements made with the husband acting for the plaintiff were therefore properly received in evidence. They were not mere declarations of an agent, but were *res gestæ*. They became, and were, in part, the acts and agreements of the plaintiff herself, after she took the conveyance and held the land under it.

The evidence of the agreement in respect to the reservation of the timber, and that the plaintiff should convey it to the defendant, did not tend to vary or contradict the covenants in the deed. The agreement to convey the timber was founded upon the deed, and was in no respect in hostility to it. It was like any other parol agreement to convey an interest in land founded upon any other consideration, which has been paid by the purchaser. It is not the fault of the defendant, Milton H. Ottley, that his right now rests in parol. It was agreed that it should be secured by a written conveyance, and it now rests in parol merely because the plaintiff, in violation of her obligation, has refused to execute the written instrument. Under such circumstances, the plaintiff

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attempts, with bad grace, to set up the non-existence of written evidence of the right. The courts will not allow a party to take advantage of his own wrong in this way. It would be using the statute of frauds to promote, instead of preventing, frauds and perjuries. The plaintiff, upon the facts of this case, is estopped from setting up the statute of frauds. (*Ryan v. Dox*, 34 N. Y. R., 307, and cases there cited.)

The judgment is right and must be affirmed with costs.

CASES ADJUDGED

IN THE

SUPREME COURT

OF THE

STATE OF NEW YORK.

THE PEOPLE, &c., Respondents, v. WALTER S. CHURCH and others, Appellants, impleaded with The Albany and Susquehanna Railroad Company.

(GENERAL TERM, FOURTH DEPARTMENT, JUNE, 1870.)

After trial of an action by the court, the successful party, unless by express direction, or special agreement, is not required to submit a draft of the judgment, before entry thereof, to the adverse party, or have it settled upon notice.

Semble, That upon a motion to set aside, or modify a judgment, on the ground that no notice was given of its settlement, its entry, in some material particular, otherwise than in accordance with the findings of law, or fact, must be pointed out.

A motion to set aside a judgment, is not the proper remedy for an omission to find a fact, supported by the evidence.

Semble, That if the fact is established by uncontroverted evidence, the remedy is by appeal.

And that when the evidence upon the fact is conflicting, the course is to deliver to the judge, when the case is presented for settlement, a request to find the desired facts and conclusions of law, and that exception lies for his refusal.

Where the decision after a trial by the court, provided for a decree, among other things, directing a delivery by the receiver appointed in the action, of the property in controversy, to certain of the defendants, and the decree had been entered pursuant to the decision.—*Held*, that assuming

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the judgment to be still incomplete, so that no appeal could be taken thereon, and that so much of the decree as directed such delivery was in the nature of an interlocutory order, an appeal would lie therefrom, as such, and proceedings taken in pursuance of the same, could not be set aside on motion at Special Term.

An order, granted on affidavits showing a decision made in an action, but that judgment had not been entered thereon, and staying proceedings on "the decision," does not stay proceedings on the judgment, and if served after judgment entered, is *functus officio* when served. After the entry of judgment in an action by the people, declaring the rights of certain defendants to the exclusion of others, to hold and exercise the office of directors of a railroad corporation, vacating a receivership, and directing delivery of the property of the corporation to the directors declared to be entitled, it seems an order staying "all proceedings upon the judgment until the entry of an order on a motion to set aside the judgment," does not stay proceedings to obtain possession from the receiver of the keys of the corporation safe and property.

An order granted upon order to show cause after service of such stay of proceedings, no steps having been taken under it, will not be set aside upon a general motion to set aside the judgment and proceedings taken thereupon.

Nor does an appeal and undertaking thereon stay such proceedings.

And it seems, in such a case, when the judgment is entered upon the direction of a single judge, in order to stay proceedings on the judgment, as to so much thereof at least as respects the delivery and taking possession of the property ordered to be delivered, security must be given as provided in sections 336 and 338 of the Code.

Nor would the court, as grounds for setting aside the proceedings, taken in the exercise of legal rights, inquire into the motives of the parties taking them.

It is not irregular for the judge, before whom a trial is had, to furnish the successful party with his findings before they are filed, or to permit the attorney for such party to draw up the proposed findings.

The practice in this respect stated and approved per TALCOTT, J.

A certificate and certain affidavits used on the motion below, held to be irrelevant and the affidavits scandalous, having been stricken out of the motion papers by the order appealed from.—*Held*, that the order, in this respect, should be affirmed.

APPEAL from an order refusing a motion to set aside a judgment entered under the decision of Mr. Justice E. DARWIN SMITH in this case, as rendered after trial before him at Special Term in Monroe county.*

* Vide 1 Lansing, 808.

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David Dudley Field, for the appellant.

G. H. Danforth, for the respondent.

Present—MULLIN, P. J., and TALCOTT, J.

By the Court—TALCOTT, J. This is an appeal from an order made at a Special Term in Monroe county, denying a motion made by Messrs. Field and Shearman, as attorneys for Church and others, to set aside all proceedings taken upon the alleged judgment, entered 31st December, 1869, to require the receiver, Robert L. Banks to retake possession of the property of which he was originally made receiver, and the persons to whom he has surrendered it, to restore possession to him or some other receiver, and to vacate and set aside the alleged judgment, and the decision therein mentioned, as irregular; or in the alternative that so much of the motion be denied, then that the said alleged judgment be set aside, and the said decision and findings be sent back to the judge who tried the cause for re-examination and resettlement, and for other and further relief, etc.

It is not entirely certain, from the papers before us, in behalf of what parties the motion was made, as the notice of motion was given by Messrs. Field and Shearman, as attorneys for defendant Church and others, and nothing appears in the papers to show for what other defendants besides Church, Messrs. Field and Shearman had appeared as attorneys.

The appeal, however, was argued upon the assumption, on both sides, that the motion was made in behalf of the persons claiming to be the directors of the railroad company, who had assumed to elect Walter S. Church, Esq., as president, and who, on the argument, were, and herein for convenience will be, styled the Church directors, and was resisted by those claiming to be directors of the road company, who had assumed to elect Joseph H. Ramsey, Esq., as president, and who were, and will be, herein styled the Ramsey

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directors. Both sets of directors, with the presidents by them respectively elected, were parties defendants to the suit. The appeal before us, as appears from the notice of appeal, was taken by the Church directors and one A. J. Phelps. The complaint in the action is not among the papers submitted to us, and from the papers before us we are unable to discover the connection of Mr. Phelps with the case. But it was not claimed, upon the argument, that he had any interest or right other than such as was asserted in behalf of the Church directors. These rival sets of directors had been contending for the possession of the franchise and property of the road, and not only were a great variety of suits commenced and injunctions issued in the interest of these respective parties, but the public peace was seriously endangered, and even disturbed, by their controversies. Under these circumstances, the governor of the State, at the request of both parties to the controversy, and in the interests of public order, took, by his agents, temporary possession of the road and its property, and thereupon the attorney-general, upon the request of the governor, instituted this action, the main object of which was to determine whether either, and if either, then which, of the rival sets of directors had been lawfully chosen, and was entitled to the possession of the franchises and property of the railroad company. The action was tried before Mr. Justice E. DARWIN SMITH, at the Monroe Special Term, held on the 29th day of November, 1869. The said justice delivered an elaborate opinion in the case, which, it appears, was published in the Rochester morning papers of December 31, 1869; and on that day the findings of fact, and conclusions of law arrived at by the said justice, and stated by him in writing, were duly filed, and the judgment or order complained of was entered on the same day at two o'clock and thirty minutes P. M. By this judgment or order the Ramsey electors were declared to have been duly elected, and to be the lawful directors of the company. It was ordered that the people (the plaintiffs) and certain of the defendants recover their costs of the action against the Church

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directors; that it be referred to Hon. SAMUEL L. SELDEN, to pass the accounts of the receiver, and to report what would be a proper extra allowance in the action, and to which of the defendants it should be paid; "to settle such other matters of detail as may be necessary to carry this judgment into effect;" and that the Ramsey directors be let into immediate possession of the property and effects of the road company, and that Mr. Banks, the receiver, transfer to them all the property and assets of the railroad company in his hands, retaining out of the moneys in his hands, as such receiver, his fees, expenses and charges, to be adjudged by the referee.

The Special Term which made the order, now appealed from, as a part of the order, directed the suppression of certain affidavits on both sides and a certain certificate used on the motion. The points insisted upon by the counsel for the appellants will, for convenience, be considered *seriatim* in the order in which they are presented by their brief.

1st. It is claimed that it was the duty of the successful party, after making a draft of their judgment, to submit it to the adverse party to propose amendments, and that the omission to do so renders the judgment irregular. We do not understand that the service of a draft of judgment, and the other proceedings referred to, is required by any present provision of law or rule of court, or has been usual under the present practice. Under the former practice of the Court of Chancery, it was customary, in cases where the decree was very special in its character, to serve a copy of the proposed decree upon the opposite party, with notice of settlement before the register. This practice apparently grew out of the fact that there was no other guide to the form of the decree than the mere minute of the decision or the opinion delivered by the court. In case the register did not understand the decision, he was, in that case only, to apply to the court for information. But it does not appear that it was the practice of that court to set aside a decree, merely upon the allegation that a draft had not been previously served, and a settlement made on notice. There were no specific findings of all

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the facts or conclusions of law accessible to the register or the parties. As the Code now provides that the justice who tries the case shall give a decision in writing, which shall contain a statement of the facts found and the conclusions of law separately, and that "judgment upon the decision shall be entered accordingly," the reason for the former practice is, in a great measure, done away with, though something similar may be, and often is convenient under our present system. It is not unusual at present, when the judgment requires provisions of a special character, for the court, in its discretion, to order it to be settled before, not the clerk, but itself or one of its members. This is often done in the Supreme Court and sometimes in the Court of Appeals. An instance of the latter occurs in the case of *Schemerhorn v. Tallman* (14 N. Y., 94), where it was ordered that the judgment be settled before Judge SELDEN. Owing to the certainty which the clerk and attorneys may now arrive at, in regard to the decision of the court, touching all questions of fact and law intended to be decided by it, the former practice has been long since abandoned and the settlement of the form of a judgment upon notice, now takes place only by the express direction of the court, or by the special agreement of the parties. And it is necessary before a party can set aside or even modify a judgment for want of notice of settlement, to show that in some material particular to be pointed out it is entered otherwise than in accordance with the findings of fact or law as stated by the judge or referee.

2d. It is said this judgment should be set aside for what is called a mistrial, by reason of the omission of Mr. Justice SMITH to decide the issues which were in the case and contested on the trial. On this point it might be sufficient to say, that the appeal papers do not disclose to us the evidence in the cause, so that we are unable to see what was contested on the trial. But assuming the position of the counsel for the appellants to be well founded in fact, we are of the opinion that whatever may be the remedies to which a party may resort in case of the omission to find a fact supported by the

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evidence and deemed material, a special motion to set aside the judgment for irregularity is not among them. According to a recent decision of the Court of Appeals, the remedy in case the fact is established by uncontroverted evidence is by appeal. (*Mason v. Lord*, 40 N. Y., 476.) Where the evidence is conflicting as to the fact, the omission to find which is complained of, the remedy is at the time the case is presented to the judge for settlement, to present and leave a request to find such facts and conclusions of law as he deems necessary to be found in order to protect the rights of the party, and it is the duty of the judge to pass upon such requests, and to find as requested or then refuse to find, so that the party may have the benefit of an exception to his refusal. Such we understand to be the construction of section 268 of the Code, which requires the judge on the settlement of the case to specify the facts found by him and his conclusions of law. The omission to find the alleged fact may have resulted from inadvertence on the part of the justice who tried the cause. On the other hand, it may have resulted from his having determined the fact against the party complaining of the omission, or he may have determined the fact to be immaterial in the case. In either of the two latter alternatives, a motion at Special Term would be simply a review of the decision of the Special Term which decided the cause, and a review of a judgment at Special Term cannot be had at another Special Term.

3d. It is claimed that no judgment has yet been perfected so as to be the subject of review on appeal. That until it becomes complete and final, it is not in a condition to be executed; and that all proceedings taken under it ought to be set aside. Conceding that this were as claimed by the counsel for the appellants, not a final judgment, but in the nature of a decretal order, or interlocutory decree, the proceedings under it which they ask to set aside, are simply the surrender of the property by the receiver and the taking of the possession by the Ramsey directors, we see no reason to doubt that the court may by order, in the nature of an interlocutory

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decree, direct its receiver in the action to surrender the property in his possession, as such receiver, to some of the parties to the action, to another receiver, or even as has sometimes been done, to a third party claiming it. And whether such order be interlocutory or final, an appeal lies, to the General Term at least.

4th. It is next claimed that the proceedings taken under the judgment or order should be set aside, because they were taken in despite of the two orders to stay proceedings, made by Mr. Justice BARNARD, and of the appeal and undertaking.

The first order of Mr. Justice BARNARD was to stay all proceedings on the "decision" of Mr. Justice SMITH until the findings of fact and conclusions of law had been served upon all the parties, with notices of settlement, and that judgment be not entered until the settlement of such findings and conclusions, upon due notice of settlement to all the parties. This order appears to have been founded on the affidavit of Amasa A. Redfield, to the effect that he had learned that the justice had decided the cause adversely to the deponent; that deponent had received no formal notice of the findings of fact or conclusions of law as found by Justice SMITH, and that according to his belief no such findings of fact had been filed or judgment entered.

This seems to have been substantially the same application which had been previously made by Mr. Martindale to Mr. Justice SMITH on the same state of facts, and by him denied, which circumstance was not disclosed in the affidavit presented to Mr. Justice BARNARD, and was, perhaps, unknown to the attorney who made the application to the latter justice. (See rule 23.) However this may be, it is apparent on the face of Mr. Justice BARNARD's order that it was not intended to operate as a stay of proceedings after the judgment or order to be entered on Justice SMITH's decision; and as it was not served till after the entry of that judgment or order, it became *functus officio*.

A second order was made by Mr. Justice BARNARD staying all proceedings under the judgment, until the entry of an

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order on the motion to set aside the judgment, not exceeding twenty days. The act of the Ramsey directors in taking formal possession of the property occurred on the 31st of December, the order in question was not served upon any person till sometime on the first of January. On that day proceedings were taken before Mr. Justice PECKHAM in Albany, on notice to the receiver apparently with a view of obtaining the possession of the key of the safe. These proceedings before Mr. Justice PECKHAM, were instituted by an order to show cause founded upon affidavit, showing that the Ramsey directors had, the day before, taken possession of the office of the company, and by a formal resolution reciting the fact of the judgment, had assumed to take possession of all the property of the company. That Mr. Banks the receiver declined to deliver the key of the safe, and the order was to show cause why he (the receiver) should not deliver all the keys of the company in his possession. The proceedings before Mr. Justice PECKHAM, after hearing counsel for the receiver, resulted in an order made by that justice on the 1st of January, that the receiver should deliver over to Mr. Ramsey the keys of the safe and all the other property of the railroad company in his hands, and furthermore declaring that the orders of Mr. Justice BARNARD did not in any way affect the obligation and duty of the receiver to comply with the requirements of the judgment. The appeal papers do not show that anything was done in pursuance of the order of Mr. Justice PECKHAM. They do not show that the second order of Mr. Justice BARNARD was served before those proceedings were instituted, although it appears that the order to stay had been served on the receiver before the final order made by Justice PECKHAM. There is nothing, therefore, to set aside except the final order made by Mr. Justice PECKHAM. It was held by Mr. Justice MASON in a case quite analogous, that a proceeding such as that before Mr. Justice PECKHAM, was not a proceeding upon the judgment. (*Welch v. Cook*, 7 How. Prac. Rep., 282.) There the application was for an order to deliver the books and papers belonging to the state treasurer.

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If that decision be correct, it is obvious that the order of Mr. Justice BARNARD made in this action to stay proceedings on the judgment could not have the effect to stay the proceedings before Justice PECKHAM. And, at all events, we think the order of Mr. Justice PECKHAM could not be set aside except upon some direct proceedings to set it aside by motion, certiorari or otherwise. No act is shown to have been done under that order, and we do not feel called upon simply to set the order aside on this somewhat collateral motion, the notice of which does not refer to the order.

As to the claim that the proceedings were stayed by the appeal and undertaking, the decision of Mr. Justice MASON, that the proceeding is not a proceeding on the judgment equally applies; but, moreover, as appears from the papers before us, the appeal was from the entry *as a judgment*, and the only undertaking filed is for the costs and damages to be awarded against the appellants on the appeal. The judgment appealed from directed the delivery of a large amount of real and personal property. Section 348 of the Code provides, that an appeal from a judgment entered on the direction of a single judge of the same court does not stay the proceedings, unless security be given as on an appeal to the Court of Appeals. Therefore, to stay the proceedings on the appeal in this case, at least, so far as regarded the delivery and taking possession of the property ordered to be delivered, it was requisite that security should be given as provided in sections 336 and 338 of the Code. This was not done or attempted. It is stated that the proceedings of the Ramsey party were taken for the purpose of forestalling an appeal and stay of proceedings.

We cannot inquire into the motives of the parties, but only whether they have been exercising their legal rights.

Under this point it is claimed, that it is irregular for the judge to furnish the successful party with his findings before they are filed, or to permit the attorney for the successful party to draw up the proposed findings.

We think, on the contrary, this will be found to have been

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the usual practice. Sometimes the counsel for the respective parties submit, at the time of the summing up, the form of the findings and conclusions of law which they respectively claim should be arrived at in the case. And where this is not done formally and in writing it is supposed that the arguments of the counsel have been addressed to the question of what conclusions of fact and law ought to be found and stated upon the evidence. And we think it has been quite usual in practice, especially in cases where the findings are long, for the justice who tried the case to furnish the attorney of the successful party with a brief minute of his decision, and request him to prepare in form the statement of the findings of fact and conclusions of law; and where these have been submitted and altered and amended, according to the actual decision of the judge, the latter often, instead of going or sending them to the clerk's office, personally delivers them to the attorney to be filed. Sometimes the justice is in one place, the attorney for the successful party in another, and the clerk's office in a third. And in such cases it has not been unusual for the justice to send the findings, when signed, by mail to the attorney for the successful party, to be filed. and certainly, in most cases, without any communication to the unsuccessful party.

In fact, the decision of the judge, as to drawing up, delivery and filing, has in practice, been treated in the same manner as the report of a referee, and for the same reasons. We are not aware that complaint has ever been made, that a referee did not file his report personally, that it was drawn up by the successful party, or that it was not communicated, before filing, to the opposite party, and we see no reason for a difference of practice in the two cases.

The sixth, and last point made by the appellants, relates to the suppression on the motion below of the certificate and affidavits.

This was a motion to set aside the judgment, or order for irregularity. The certificate was to the effect, that the opinion of Mr. Justice SMITH, delivered in the case, was

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erroneous. Obviously, this had no bearing on the question of the regularity of the judgment. It is equally clear, that the affidavits touching what transpired in the interview between Mr. Martindale and the justice, at the house of the latter, and again when the order to stay proceedings was moved for and denied, had no relevancy to the question.

Matters set forth in papers presented to the court, or filed, which are not material to the decision, are impertinent, and, if reproachful, are scandalous. (1 Barbour's Chy. Prac., 202.)

This certificate, and the affidavits in question being irrelevant, were impertinent. And the affidavits tending to impute to the justice, vacillation of purpose or opinion, and to the counsel for the Church directors, great infirmity of temper were also scandalous.

In such case, affidavits and other papers, on a motion, may be suppressed by the court on inspection. (1 Barbour Ch. Prac., 574.) We are of the opinion that the order appealed from should be affirmed with ten dollars costs, and order accordingly.

Order affirmed.

The order appealed from, having been made by Mr. Justice JOHNSON, he did not sit on the hearing of the appeal.

GEORGE W. BELDEN, Administrator, &c., Respondent, v.
ELLIOTT MEEKER, impleaded, &c., Appellant.

(GENERAL TERM, FOURTH DEPARTMENT, JUNE, 1870.)

To maintain his action as administrator, the plaintiff proved letters of administration in which his intestate's decease, and residence immediately prior thereto in the county of the surrogate from whom the letters issued, were recited.—*Held*, that there was *prima facie* evidence of the facts so recited.

Proof that the intestate did business and had an office in the county, is, it seems, presumptive evidence that he resided there at his decease.

An assignment of a bond and mortgage, and "the moneys due and to grow

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due thereon," carries by its terms a note for which they are held as collateral.

The debtor upon a security for a sum exceeding \$1,000, may not impeach a transfer thereof on the ground that it was made for a moneyed corporation (1 R. S., 591, § 8), by its president, without authority by previous resolution of the board of directors.

Nor can he avail himself of an objection that such transfer was made by the president to pay an individual debt, and without consideration passing to the corporation.

And, it seems, without proof to the contrary due authority to the president will be presumed in favor of the transfer.

The assignee of a mortgage is a purchaser of "real estate" within the intent of section 1 of the recording act (1 R. S., 756); and the assignment being made in good faith and for a valuable consideration, he is protected by the record thereof against a release subsequently made by his assignor.

The principles of the recording acts are extended by the Revised Statutes to assignments of mortgages. Upon this point *Vanderkemp v. Shelton* (11 Paige, 38) reaffirmed, and *Hoyt v. Hoyt* (8 Bosw., 577) distinguished and explained. Per TALCOTT, J.

THIS was an action to foreclose a mortgage. The facts are sufficiently stated in the opinion of the court.

Erastus P. Hart, for the appellant.

John W. Dininy, for the respondent.

Present—MULLIN, P. J., and TALCOTT, J.

By the Court—TALCOTT, J. Appeal from judgment in a foreclosure case rendered by Mr. Justice JOHNSON at Special Term, in Steuben county.

James M. Osborn and Peter Wells were copartners in keeping a hotel, which was also owned by them. On the 14th of July, 1856, they had a note for \$4,000 payable three months after date, discounted by the bank of Hornellsville, a bank organized under the general banking law. At the same time and as collateral to the note, they executed and delivered to "Samuel Hallett, president of the Bank of Hornellsville," their joint bond conditioned for the payment of the \$4,000 with interest, and their joint mortgage on the hotel property. At the same time Osborne executed his individual bond

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accompanied by a mortgage on certain real estate owned by him individually, also collateral to the said note. On the 15th of October, 1856, Samuel Hallett, president of the bank of Hornellsville, "assigned to Charles Belden, of the city of New York, the joint bond and accompanying mortgage," and the moneys due and to grow due thereon, with the interest.

The bank had a board of directors. The assignment was made to Charles Belden to secure an individual indebtedness of Hallett. The note was not delivered to Belden at the time of the assignment of the bond and mortgage, but remained in the bank, and payments were there made upon it by the makers from time to time down to the middle of May, 1857, leaving unpaid a sum with interest for which the judgment was rendered. The note was indorsed in blank by the payee and others, and at some time before his death was delivered to Belden, by one of the officers of the bank. There was no proof of any resolution of the board of directors, authorizing the transfer of the note or bond and mortgage. The assignment to Belden was recorded October 6th, 1857.

September 4th, 1857, James M. Osborn sold and conveyed his interest in the hotel property to his partner, Peter Wells, who executed back a mortgage for a part of the purchase money, which mortgage was assigned to one Hyatt, who foreclosed the same and sold the property on the decree to the defendant, Elliott Meeker, who received a conveyance from the sheriff in April, 1859, then having no *actual* knowledge of the assignment of the joint mortgage of Wells and Osborn to Belden, and who purchased the property upon the information and belief that the hotel property had been released by Hallett from the lien of the joint mortgage, except in case the individual property of Osborn mortgaged for the same debt should prove insufficient. And on the trial the defendant, Meeker, established that such an instrument had been at some time executed by Hallett as president, &c., and delivered to Wells, but it was not produced and could not be found on the trial, and had never been acknowledged or recorded. The court at Special Term found as a matter of

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fact that this instrument was so executed by Hallett after his return from Europe in the fall of 1858.

The appellant presents three points for consideration :

1st. That there was not sufficient evidence of the plaintiff's character and right to sue, because the death of Charles Belden, and the other facts necessary to give the surrogate of New York jurisdiction to grant the letters of administration were not proved *aliunde*, the letters.

2d. That the assignment to Charles Belden was void, because it was for the individual indebtedness of Hallett to Belden, and because no resolution of the directors authorizing the transfer was proved, and

3d. Because of the alleged release, the plaintiff should be required first to resort to the individual mortgage of Osborne; and that the record of the assignment of the joint mortgage to Belden did not operate as notice to Meeker of its existence and date.

The statute (2 R. S., 80, § 56), provides that letters of administration, granted by an officer having jurisdiction, shall be conclusive evidence of the authority of the person to whom they may be granted, until the same shall be reversed or revoked.

The jurisdictional facts necessary were, first, the death; second, the fact that the intestate was at, or immediately previous to his death, an inhabitant of the county of the surrogate granting the letters.

Letters of administration are *prima facie* evidence of the death of the intestate. (1 Greenleaf's Ev., § 550; *Newman v. Jenkins*, 10 Pick., 515.)

It appeared in the evidence, that the intestate did business, and had an office in New York; presumptively he was an inhabitant there, up to the time of his death, nothing appearing to the contrary. Besides, as a general rule, the recital in the decree of a court of inferior jurisdiction, of the facts necessary to give jurisdiction, is *prima facie* evidence of such facts, subject to be contradicted, but sufficient *per se* to uphold the proceeding if uncontradicted. (*Barber v. Winslow*, 12 Wend., 102.) The surrogate's order, granting the

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administration, and proved by exemplification in this case, recites all necessary facts.

Presumptively, these facts were found upon competent evidence. In the case referred to by the appellant's counsel (*Sibley v. Waffle*, 16 N. Y., 184), Mr. Justice Bowen, delivering the opinion, says: "I think the letters issued to Stephen Dusenbury were *prima facie* evidence of his due appointment, and that the requisite evidence was before the surrogate to authorize his action, the contrary not appearing."

The assignment of the bond and mortgage by its terms carried the principal debt; it was not only of the bond and mortgage, but of the "moneys due, and to grow due thereon."

The statute prohibiting the transfer of the assets of a moneyed corporation exceeding \$1,000 in value, without a previous resolution of the board of directors, is for the benefit of the corporation, its stockholders, and creditors; so long as none of these seek to repudiate the transaction, the debtor cannot impeach the transfer for want of proof of a previous resolution. (*Eno v. Crooke*, 10 N. Y., 65; *Elwell v. Dodge*, 38 Barb., 386.) It is to be presumed, that Hallett, the president of the bank, had authority to make the transfer, nothing appearing to the contrary; and although in fact the transfer was made to secure Hallett's individual indebtedness, yet in the absence of any objection on the part of the bank, its stockholders, or creditors, the debtor cannot raise the objection, that there was no consideration between Hallett and the bank for the assignment, or that the use of it, to secure the individual debt of Hallett, was a fraud upon the bank.

We are not called upon to consider whether the payments made upon the note after the assignment, and while the note was left in the possession of the bank can be repudiated by the assignee, since the plaintiff only claims to recover, and has only obtained judgment for the amount unpaid.

As to the release, the court finds upon sufficient evidence, that the release was executed after the assignment of the bond and mortgage and debt to Belden was recorded. This we think is fatal to that branch of the defence.

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We are referred to a decision of the Superior Court of New York (*Hoyt v. Hoyt*, 8 Bosw., 511), purporting to overrule the case of *Vanderkemp v. Shelton* (11 Paige, 38), and holding that the record of the assignment of a mortgage does not protect the assignee against a prior unrecorded assignment of the same mortgage of which the second assignee had no notice, although he might be a purchaser in good faith, upon the ground that the statute protection is given only to a purchaser of the real estate conveyed and not to a purchaser of the conveyance.

It is to be remarked, that in *Hoyt v. Hoyt*, the court held that the second assignee took his assignment only as security, and was not, therefore, a *bona fide* purchaser "for a valuable consideration."

The observations, therefore, of the court on the subject of the effect of recording an assignment of a mortgage were not necessary to the decision of the case. But we are of opinion that the construction of the recording act adopted by the chancellor in *Vanderkemp v. Shelton*, is the true one, to wit: That by the Revised Statutes the principles of the recording acts are extended to assignments of mortgages. It is conceded by the court in *Hoyt v. Hoyt*, that an assignment of a mortgage comes within the definition of "conveyance" as used in the recording act, and may be recorded as such; this must be upon the ground that it is an "instrument in writing by which an interest in real estate" is "assigned."

The assignee of a mortgage by the assignment surely acquires the interest in the real estate which the mortgagee took by the mortgage, and he is to that extent the purchaser of the same real estate.

The words in the first section of the recording act "of the same real estate, or any portion thereof," must be held to embrace, not only the purchaser in fee of any *specific portion*, but the purchaser of any *interest* in the whole or any part thereof.

The purchaser of a mortgage is not only "a purchaser of the conveyance," but is a purchaser of the *interest* which is

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conveyed by the conveyance. The spirit and intent of the recording acts is to make the recording of an instrument, entitled to be recorded, constructive notice to all parties subsequently dealing with the same title.

Any other construction as applied to the assignment of a mortgage, would be attended with great inconvenience, and much impair the value of these securities. The doctrine contended for by the appellant in this case, would make it incumbent upon every assignee of a mortgage to keep a constant watch of the transfers of the equity of redemption, in order to give *actual notice* of his assignment to the purchaser, and thus protect himself from a release, or discharge of his mortgage, to be executed by the original mortgagee.

And in this case, no amount of vigilance would have protected the assignee, as the release was executed without his knowledge, not put upon record, but known to, and relied upon by the purchaser of the equity of redemption, at the time of his purchase. Such a construction of the recording act could not be tolerated.

The statute makes one exception to the effect of the record of the assignment of a mortgage as notice. Section 42 (41), provides that the record of such assignment shall not be deemed in itself, notice of such assignment to a mortgagor, his heirs, or personal representatives, so as to invalidate any payment made by them, or either of them.

This was to save the necessity of examining the record every time it was intended to make a payment, and affords a clear implication, that for all other purposes, the record of the assignment is notice, even to the mortgagor.

In this case, therefore, the assignment of the mortgage having taken place, and been recorded prior to the execution by the mortgagee of the release, the mortgagor who obtained it, and all persons acting upon it, must be deemed to have had notice, that the original mortgagee had no power to release the premises, wholly or partially, from the operation of the mortgage at the time when he undertook to do so.

The judgment of the Special Term is affirmed with costs.

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Mr. Justice JOHNSON having decided the case at Special Term, did not sit on the appeal.

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GEORGE S. WHITNEY v. ADAM SNYDER, impleaded, &c.

(GENERAL TERM, FOURTH DEPARTMENT, SEPTEMBER, 1870.)

In an action upon a negotiable promissory note, brought by a purchaser thereof before maturity, in good faith and for a valuable consideration, against the maker, the latter may prove as a defence, that when he signed it, it was represented to him, and he believed it, to be a contract entirely different in character.

The case distinguished from that of a note fraudulently obtained, and which the maker intended to make.

THIS was a motion for a new trial on a case and exceptions heard by order of the court at General Term, in the first instance.

The action was upon a promissory note payable to bearer, and signed by the defendants who were jointly and severally chargeable as makers by the terms of the note. The facts are stated in the opinion of the court.

George H. Danforth, for the plaintiff.

Scott Lord, for the defendant.

Present—MULLIN, P. J., TALCOTT, and E. D. SMITH, JJ.

By the Court—TALCOTT, J. This was an action against the defendant as maker of a promissory note. The plaintiff had testified that he purchased the note for value and before maturity. The defendant offered to prove in defence, that he was unable to read, and that when he signed the note it was represented to him, and he believed, that it was a certain other contract, offered to be also produced in evidence, and which purported to be a contract *inter partes* of an entirely different character. The offer was overruled and the defendant excepted, and now moves for a new trial. We think the

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learned judge at *nisi prius* erred in rejecting the evidence offered. The consent of the party alleged to have made it is essential to the binding force of a contract. This principle has been often applied to the case of deeds and other instruments misread, or the contents of which have been misrepresented to the party against whom the instrument is sought to be enforced. A *bona fide* holder of commercial paper for value and before maturity, is protected in many cases against defences which are perfectly available as between the original parties, such as that the signature was obtained by false and fraudulent representations. That the paper has been diverted. That a blank bill or acceptance has been filled up for a greater amount than the party to whom it was delivered was authorized to insert, &c. But in all these cases the party intended to sign and put in circulation the instrument as a negotiable security; where this is the case he is bound to know that he is furnishing the means whereby third parties may be deceived, and innocently led to part with their property on the faith of his signature, and in ignorance of the true state of facts. But, while this is a rule of great convenience and propriety, there are, and must be some limits to its application, some defences as to which even a *bona fide* purchaser, purchases at his peril.

The familiar case of a note declared void by statute, as in the case of usury, furnishes an illustration. During the period when, according to the statute law of this State, a *bona fide* holder for value, and before maturity, was protected against even the defence of usury, the statute against usury was practically almost abrogated as to negotiable paper.

The precise question presented here, as applied to commercial paper in the hands of a *bona fide* holder, &c., has, so far as we have been able to discover, been presented in but one case, and that a very recent one, viz.: The case of *Foster v. McKinnon*, decided in the English Common Pleas, in July, 1869, and reported in 38 Law Journal Reports, new series, page 310, which case was very fully argued, and carefully considered by the court, upon examination of all authori

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ties which could be found bearing on the question. In that case, the defendant was sued as indorser of a bill by a *bona fide* holder, and it was in its circumstances, quite similar to the case at bar, except that the present is a somewhat stronger case for the defendant on the question of negligence. In that case the defendant proved, that though the instrument he indorsed was in fact a bill when he indorsed it, and was upon a paper having the ordinary shape and size of a bill, and had a bill stamp impressed upon the face, which impression was visible on the back, yet he, the defendant, did not look at the face of the bill, and when he wrote his name upon the back, it was represented to him, and he believed it, to be a guarantee.

Under these circumstances, the lord chief justice, who tried the cause, left it to the jury to say, whether the signature was obtained on a fraudulent representation, that the paper to which it was put was a guarantee, and instructed the jury that if it was so obtained, and the defendant signed it, not knowing it was a bill, and under the belief that it was a guarantee, and if he was not guilty of any negligence in writing his name on the bill, without ascertaining what he was signing, he would be entitled to their verdict. This instruction was sustained by the whole court, in an elaborate opinion delivered by BYLES, J. We are satisfied with the reasoning of the court in that case, and we think any other rule would be fraught with great danger to the security of property. If, as to a party who can give evidence, that he purchased the bill for value, and before maturity, and as to whom the defendant is unable to bring home notice, the question of liability is reduced to a mere question of the genuineness of the signature, we do not see how a party would be able to escape liability, as suggested by the court in the case referred to, where he had written his name in a lady's album, or for the purpose of franking a letter, or for any one of the thousand purposes for which a man is often called upon to furnish a signature, without the intention of making a negotiable instrument. The true distinction was tersely stated by

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BOVILL, Ch. J., in *Foster v. McKinnon*, interrupting counsel, *arguendo*, who was stating the proposition, that where the plaintiff proves he is a *bona fide* holder for value, it is immaterial that the signature of the defendant was obtained by fraud. "That," said the chief justice, "is where the defendant intended to put his name to an instrument which was a bill." The exception to the refusal to admit the evidence offered was well taken.

A new trial must be granted, costs to abide the event.

MULLIN, P. J., read an opinion to same effect.

Ordered accordingly.

GERTRUDE KOELGES, Respondent, v. THE GUARDIAN LIFE
INSURANCE COMPANY, Appellant.

(GENERAL TERM, SECOND DEPARTMENT, JUNE, 1870.)

A life insurance company issued a policy, which became forfeited by failure of the insured to meet the premiums according to its terms. The insured, however, called at the company's office, inquired of its clerk if she might pay the premiums; was informed by him that she might, and of their amount, which she promised to call and pay; but the clerk offering to call and receive it at her house, she afterward made the payment to him there, and received separate receipts for the several premiums, signed by him for the secretary of the company. The payment was brought to the knowledge of the company's cashier, but he did not, nor did the company, ever receive the premiums paid. The clerk had sometimes been employed to collect premiums on non-forfeited policies, but had no authority to receive premiums upon those which were forfeited. In an action upon the policy to recover the insurance as provided therein.—*Held*, that the forfeiture had not been waived, and the plaintiff could not recover.

Held, further, that it was error to reject as evidence, on the trial of the action, the company's charter and by-laws.

THE complaint in this action set forth a policy of life insurance, dated July 25, 1868, issued by the defendant, upon the lives of the plaintiff and of Albert Koelges, her husband,

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for the sum of \$4,000, payable, upon the decease of either of the insured, to the survivor; and providing, among other things, for payment of the sum of \$26.93 on or before the 25th days of October, January and April then next; and also of an annual premium of \$172.32 on or before July 25th, in every year during the continuance of the policy or (with the consent of the company), quarterly in advance. It also provided as follows, viz: "in case the premium or premiums shall not be paid to said company on or before the time specified for the payment of the same, this policy shall thereupon be forfeited and cease, and determine, except as hereinbefore provided.." The complaint also alleged the death of Albert Koelges, and claimed to recover the insurance provided for in the policy.

The defendant averred in defence, the failure of the insured to comply with the requirements of the policy, in that no payments had been made of two premiums, falling due on the 25th days of April and July, 1869, respectively, and a forfeiture of the policy on account of the failure.

The plaintiff testified, that, on the last day of July, 1869, she had taken the policy to the office of the defendant in New York city, and there had conversation with a clerk of the company, who was behind a desk in the office, as follows: "I asked Mr. Holley if he could tell me if my husband had paid the premium of the policy; he asked me for the policy, so I gave it to him, and he said he would tell me right away; he got a large book and told me, no, it was not paid; so I asked him if I could pay it, and he said, why, certainly you can; I asked him how much it was; he took my policy and reckoned it out; those (pencil marks on the policy) are the marks he made; he made a memorandum on it of the amount of the premium; I told him that I could bring the money; he said I could pay it, and I wanted to fetch the money the next day; he said, never mind, I will save you the trouble; I live in Williamsburgh; I pass your house every day; I can save you the trouble, so that you need not come over here again; the day after, he came to my house, and he received

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the money and gave me two receipts; these produced are the same he gave me." The receipts were as follows:

[Temporary Receipt.]

"THE GUARDIAN MUTUAL LIFE INSURANCE COMPANY OF NEW YORK.

[2c. Int. Rev. Stamp,
canceled.]

No. 251 BROADWAY.

NEW YORK, *April 25th*, 1869.

Received from Albert and Gertrude Koelges, twenty-six 93 dollars binding Policy No. 14,980, from the 25th day of April, 1869, at noon, to the 25th day of July, 1869, at noon.

Not valid unless countersigned by J. E. Holley.

J. E. HOLLEY,

\$26.93.

For the Secretary."

(Countersigned J. E. Holley.)

[Temporary Receipt.]

"THE GUARDIAN MUTUAL LIFE INSURANCE COMPANY OF NEW YORK.

[2c. Int. Rev. Stamp,
canceled.]

No. 251 BROADWAY.

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Not valid unless countersigned by J. E. Holley.

J. E. HOLLEY,

Agent for the Secretary."

(Countersigned J. E. Holley.)

The plaintiff also testified to the death of her husband on the 2d of September, 1869, and that after his decease Holley came with two others, who were from the office of the company, one of them being its secretary, and offered to return the money paid, Holley saying he had no authority to receive it, but that she, the plaintiff, had refused it.

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One of the agents of the company also testified on behalf of the plaintiff, that he had negotiated the insurance in question with the insured, and sometime in August, 1869, had gone to the cashier of the company in the company's office and inquired whether the premiums had been paid upon the policy in question, with a view to obtaining his commissions thereon in case the premiums were paid, that he was told by the cashier that it had not been paid, and that while they were talking Holley came up and said he had received the money on the policy, and asked the witness to allow his account to remain for a month; that the cashier had requested Holley to make out an account, which he did for the two payments received by him, and which he handed to the cashier, who placed it in his drawer, and Holley promised to pay the money next month; that in the next month he, the witness, had presented his bill at the company's office, and the clerk, whose duty it was to state the account with him, informed him that the premiums had not been paid on the policy, and that Holley being called upon said he had not paid it, and requested that the account might remain another month, and he also then said that Koelges was dead.

It also appeared, that Holley had been sometimes employed to collect premiums by the company, though the collection thereof was no part of his duties, and he had been an agent of the company, but that he had in fact no authority to receive any premiums upon forfeited policies, and no proof was given as to any authority, for Holley to sign the name of the secretary of the company to the receipts given by him.

Various exceptions were taken to the evidence given, and the defendant moved for a nonsuit at the close of the defendant's testimony, which was denied, and exception taken to the refusal.

The defendant gave evidence upon the subject of defendants duties as clerk, tending to show that he was unauthorized to receive the premiums paid, or give the receipts therefor, and also as to the custom of the company, respecting the receipt of premiums upon forfeited policies, and offered in

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evidence the charter and by-laws of the company, which the court refused to receive, and an exception was taken to the refusal.

The jury gave a verdict for the amount of the insurance, and the defendant obtained time, and made a case with exceptions, and also moved at Special Term for a new trial, which was refused, and this appeal is from the order entered upon the refusal.

Livingston K. Miller, for the appellant.

D. D. Barnard, for the respondent.

Present—JOSEPH F. BARNARD, P. J., DANIELS and E. DARWIN SMITH, JJ.

By the Court—BARNARD, P. J. At the time of the payment by plaintiff to Holley of the two quarterly premiums the policy was forfeited by its terms. It then became incumbent upon the plaintiff, in order to recover upon the policy, to show a receipt of the premium, by some one authorized to receive it after the forfeiture, or to show a ratification of an unauthorized receipt by the company, by an acceptance of the money with knowledge of the facts, or in some other way.

I think the case fails to show Holley's authority to receive the money after forfeiture. He was a clerk of defendants; had been an agent to receive applications for insurance in New Jersey, which appointment had been revoked. He had been sent by a previous secretary to collect premiums, but always with strict orders to collect none on forfeited policies. Holley signed the receipts for the payments in question as agent for the then secretary. There is no proof of his power to act as agent for the secretary. Neither Holley nor the secretary is produced as a witness. If the secretary had power to waive the forfeiture, he is not proved to have done it. Holley had never done a like act, his power to bind the company, by receiving money on policies on life, would be

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no evidence of power to waive the forfeiture by receiving the premiums, after the policy had ceased to exist by reason of non-payment. The company have never received the premiums collected by Holley.

I am unable to distinguish this case in principle from an unreported case in this district (*Taylor v. The British Commercial Life Insurance Company*.) In that case, the policy was upon the life of one E. P. Taylor. William Wilson was the agent to receive the premiums; he was instructed if the premiums were not paid in thirty days, to return the receipt to the general agent in New York. The policy provided, that it should be void if the premiums were not paid within thirty days after the same became due. Taylor suffered default for over thirty days. About fifteen days after the policy became forfeited, the assured paid the premium to a clerk in the office of the agent, Wilson, within a few days after this payment the assured died. The company never received the money. The clerk in the office of the agent had generally received the premiums for his father, the agent. The court held that William Wilson had no power to waive the forfeiture, or to bind the company by receiving the money after default. That he was a special agent, and could not exceed his powers as such, and bind his principal by his acts, although the assured knew nothing of his limited powers.

In that case, the charter and by-laws were admitted in evidence. I think it was erroneous to exclude them in this case. If they did show who was authorized to remit forfeitures, they should have been received. From the evidence of the president of defendant, I suppose they did. The rejected evidence, or such parts of it as would show its pertinency, should properly have been presented by the case, so that this court could more satisfactorily determine this point. I think the judgment and order denying a new trial should be reversed, and a new trial granted, costs to abide the event.

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JAMES ROGERS and others, Respondents, v. WILLIAM A. WHEELER and others, Trustees, &c., Appellants.

(GENERAL TERM, THIRD DEPARTMENT, SEPTEMBER, 1870.)

The defendants, as trustees for the mortgage bondholders of a railroad company, obtained a decree of foreclosure and sale under the mortgage, by which they were authorized in default of bidders to purchase the mortgaged property as trustees, also to operate the railroad and receive the income thereof, until a sale or transfer; having purchased under the decree, and operated the road as thereby provided until a transfer to a company newly organized.—*Held*, that they were liable as common carriers for goods, received by them as such, while operating the road as trustees.

Held, further, that the defendants were not in possession of the property as receivers thereof, and were not relieved from liability as standing in such relation to the court, their accountability being not to the court, but to the bondholders.

And it seems that without the provisions of the decree authorizing them, it was the duty of the defendants to bid in the property if necessary to protect the interests of their *cestuis que trust*.

Held, further, the defendants having surrendered, conveyed and delivered the whole property purchased, to a company newly organized, in obedience to a decree of the court, which provided for full indemnity to them by lien upon the property, as "against all liability of every description, incurred or to arise out of, any act or contract done, or made, or omitted to be done, by them as such trustees," and having in the deed reserved such lien, that the transfer did not affect their liability for goods received by them as common carriers before the same took place.

THIS was an appeal from an order sustaining a demurrer to certain defences, interposed to the complaints in an action against the defendants, seeking to charge them as common carriers. The facts are stated in the opinion of the court.

W. C. Brown, for the appellants.

M. Hale, for the respondents.

Present—MILLER, P. J., POTTER and PARKER, JJ.

By the Court—PARKER, J. This is an appeal from an order of the Special Term, sustaining a demurrer to the fifth

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and sixth defences of the answer. The complaint avers, in substance, that the defendants were in 1864 engaged in the business of transporting goods for hire, as common carriers, from Ogdensburgh to Rouse's Point, over the Northern railroad; and that as such common carriers they received from plaintiffs and undertook to carry and deliver to plaintiffs 8,000 bushels of wheat, of the value of \$25,000. That they failed to perform their said agreement; but that by their negligence a large amount of the wheat, of the value of \$20,000, was destroyed by fire and lost. The fifth defence sets forth, in substance, that the defendants, being mortgagees of the Northern Railroad Company, in trust for certain bondholders of said company, of all the property, real and personal, of said company, upon the default of the company, foreclosed by action the two mortgages so held by them, in which action a decree was, on the 8th day of April, 1856, made for the sale of such property, which decree is set forth, authorizing these defendants, upon default of bidders, on such sale, to become the purchasers of the mortgaged property at a bid not less than \$2,000,000, in trust for such bondholders, with authority to sell the same, or lease the same from year to year, for the benefit of the bondholders; or upon the organization of a new railroad corporation, to transfer and assign the same to such new corporation and receive stock of such corporation in payment, and transfer such stock to the bondholders in proportion to the amount of bonds held by them respectively; provided such corporation should first indemnify them against all liabilities then outstanding against them on account of any act or engagement in the management of the trust property, and until the sale or transfer of such property to such corporation; that said trustees might continue to operate the railroad and receive the income thereof, appointing all necessary agents and subordinates for the complete operation of said road; and that they might purchase the necessary supplies, fuel, iron, ties, etc., and keep the road, rolling stock, fixtures and appurtenances in good and proper repair, preventing all waste, injury and destruc-

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tion of the same. That the defendants, as such trustees, pursuant to such decree, did bid in, and purchase the property in trust, and did take possession and charge of said road, and properly manage, and so continue to manage the same, until August 1st, 1865, when they, by direction of the court, transferred the same to the Ogdensburgh and Lake Champlain Railroad Company; and they allege that in regard to all the matters referred to in the complaint, they acted with due and proper care and diligence, and with sound discretion as receiving officers of the court of equity; and they insist and submit that they ought not to be held personally responsible or liable, as common carriers, as though they were pursuing a business of that nature for personal profit; whereas they were only in the charge of the property temporarily as appointees by the court, until the necessary legislative and judicial action could be had and obtained, to enable the owners of the property to be ascertained and placed in possession.

To this the plaintiffs demur, on the ground that it does not constitute a defence to the action. This defence rests upon the ground that, although the defendants were engaged in the business of transporting goods for hire upon the railroad as common carriers, that is, carriers for hire of all goods offered them for carriage (2 Parsons on Contracts, 163; *Allen v. Sackrider*, 37 N. Y. R., 341), they are exempt from liability as common carriers; because they were not transacting the business for their personal profit, but as trustees for others, under an authority conferred upon them by the court, temporarily, until the necessary arrangements could be perfected to hand over the road to the parties in interest. The defendants' counsel insists that the defendants were in possession of the railroad in the same capacity as receivers.

In this, I think, the learned counsel is in error. It is not pretended that they were actually receivers. They were plaintiffs in a foreclosure suit and obtained a decree for the sale of the mortgaged property; and, on such sale bid it in for the benefit of their *cestuis que trust*, and while holding it in trust, used it in the business of common carriers; in which business alone

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it could be used. True, in the decree of sale, which they obtained, they are specifically authorized to bid in the property, and thus temporarily to use it; but this authority, if it added anything to the duty and rights of the defendants, operates, I think, upon the trustees and *cestuis que trust*, as between themselves merely, and does not affect defendants' liability to perform any engagements between them and third persons, in regard to the use of the property. They do not occupy any such relation to the court, or to the property as if they were receivers. They were not officers of the court, as receivers are.

They did not hold the property by virtue of the appointment of the court, as receivers do. It is because receivers are officers of the court administering property put into their hands for that purpose by the court, that they are protected. (Edw. on Receivers, 3.) Manifestly the defendants were not in possession of the railroad and its appurtenances in the same capacity as receivers, but merely as trustees of the bondholders and accountable to them.

Without the provisions of the decree authorizing them, it was their duty to bid in the property if necessary to protect the interests of the bondholders. This duty was not imposed upon them by the court. (*Clark v. Clark*, 8 Paige 157, 158); nor was the duty of operating the road thus imposed upon them. The authority was at most permissive; and their acts voluntary and discretionary, and not acts of the court, by them as its officers.

When they come to deal with third persons, in the use of the property, there is no reason why they should not be responsible to them upon all their undertakings. The fact that they are trustees, and accountable as such in the use of the railroad, does not relieve them from the full performance of all that they have undertaken to do for others, nor from the liabilities arising from failure to perform.

In the case of *Blumenthal v. Brainard* (38 Verm. R., 403), this doctrine was held even as against a receiver. The language of the court is: "We think that the mere fact that

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the defendants were acting as receivers under the appointment of the Court of Chancery, cannot be recognized as a defence to a suit at law for a breach of any obligation or duty which was fairly and voluntarily assumed by them in matters of business conducted or carried on by them while acting as such receivers. As between a receiver and the parties interested in the trust, the receiver would be responsible for negligence. But he might be liable to other parties in a larger or stricter degree of responsibility. The assumption by the defendants of the peculiar duties and extraordinary responsibilities arising from the relation of common carriers is not to be considered as necessarily, if at all incompatible with any duty or responsibility imposed upon them as receivers."

So in *Paige v. Smith* (99 Mass. R., 395), the court say: "Receivers running a railroad under appointment of a Court of Chancery in another State, who act as common carriers, and are there held liable as such to actions at law, may be sued as common carriers in this commonwealth."

In *Lanphear v. Buckingham* (33 Conn., 237), it was held that a trustee of a railroad, who operates the road for the benefit of bondholders or creditors, is liable in a suit brought against him under the statute by the administrator of a person fatally injured by negligent carriage.

In all these cases the doctrine is distinctly recognized that the trusteeship of the defendants detracted nothing from their liability, and that where they were in possession and control of a railroad, holding themselves out as common carriers, and doing business as such, they became liable as such, and could not shield themselves from such liability by the fact that they were not operating the road for their own advantage, but as trustees, or even as receivers, for the benefit of others. As it was said by REDFIELD, Ch. J., in *Sprague v. Smith* (29 Verm., 421): "It would be perplexing in the extreme to require strangers suffering injury through the negligence of operatives under the defendants' control to look beyond the party exercising the control."

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The same principle of personal liability of trustees in reference to their dealings with third persons is applicable to executors, as shown by Chitty when he says: "So if an executor trustee carry on trade as trustee for the benefit of the children of the testator, he will be personally liable to pay the debts, and may even be made a bankrupt in respect to them." (1 Chitty Pl., 38.)

Indeed, if the defendants are merely trustees, and not acting in the capacity of receivers, I do not understand their counsel to claim for them exemption from liability as common carriers. That they were not acting in the capacity of receivers, I think, sufficiently appears from what has been already said. The facts, then, set up in the defendants' fifth answer, or defence, are not sufficient to constitute a defence to the action, and the demurrer thereto was well taken.

The sixth answer, or defence, is, in substance, that the defendants had, before the commencement of this suit, surrendered, conveyed and delivered over the whole property to the Ogdensburgh and Lake Champlain Railroad Company, in obedience to a decree or order of the court, which is set out in full, and which provides for full indemnity to defendants, by lien upon the property, "against all liability of every description incurred, or to arise out of any act or contract done or made, or omitted to be done by them as such trustees." The deed of conveyance by defendants to the company is also set out, and this reserves such lien. The decree and conveyance were made a year after the loss of the wheat, for which the action is brought. They were transactions to which the plaintiffs were not parties, and it is difficult to see how they can affect the liability of the defendants to the plaintiffs which had previously occurred.

The demurrer to this defence also was well taken.

The order sustaining the demurrers should, therefore, be affirmed with costs.

Order affirmed.

Kinney v. Kiernan.

FRANK KINNEY v. JAMES KIERNAN and BENJAMIN F. RICE.

(GENERAL TERM, THIRD DEPARTMENT, SEPTEMBER, 1870.)

A vendor who has been induced to sell his goods by fraudulent representations, is not estopped from ratifying the sale by any act of disaffirmance which is not effectual for that purpose, and does not extend to the entire contract.

Thus where the vendee obtained a sale of goods for the checks of a third person which he fraudulently represented as good, and which came back to the vendor under protest, and the latter sued a purchaser of part of the goods from the vendee, after demand upon such purchaser and his refusal to deliver the same, to recover the value thereof, but without notice of disaffirmance to the fraudulent vendee, and return, or offer of return to the latter, of the protested checks.—*Held*, that there was not such disaffirmance of the contract of sale as prevented a subsequent action thereon.

And a suit by such vendor against the vendee to recover the whole price, and settlement of the suit, with receipt of part of the sum agreed to be paid thereon, is a ratification of the contract, and will bar proceedings for the fraud.

The vendor, after demand and refusal, brought an action against one to whom his fraudulent vendee had sold a portion of the goods, and afterward, sued such vendee to recover the whole price due upon the sale to him, and then made a settlement of the latter suit for a sum agreed on, on which sum he received a part payment.—*Held*, that the last suit was an affirmation of the contract, and a bar to a recovery in the former suit, and that this was so, although, by agreement at the time of the settlement, the subject-matter of the first suit was reserved therefrom.

Pearse v. Pettis (47 Barb., 276), cited and explained.

THIS was a motion for a new trial upon exceptions ordered to be heard in the first instance at General Term. The facts are stated in the opinion of the court.

Matthew Hale, for the plaintiff.

Amasa J. Parker, for the defendant.

Present—MILLER, P. J., POTTER and PARKER, JJ.

By the Court—PARKER, J. This action was brought to recover for the alleged wrongful conversion of 600 gallons of spirits.

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The answer denies generally the allegations of the complaint, and alleges that the property in controversy belonged to defendants and not to the plaintiff.

The proof showed that the goods in question were sold by plaintiff in New York, in December, 1867, to P. F. Gill & Co., who purchased of plaintiff a large bill of liquors, and paid for them by two checks, signed by one Nat. Wood, on the Central National Bank of Troy. James Gill, of the firm of P. F. Gill & Co., made the purchase. He represented Wood to be a wealthy man, an officer of the said bank, and one of its largest stockholders.

The goods were sold to him by plaintiff in reliance upon these representations, which, it turns out, were false. Wood was not an officer or stockholder of the bank, and was not a wealthy man. The checks were not paid, but were returned protested to the plaintiff.

Ten barrels of the liquors, sold to Gill, were by the firm sold to the defendants.

As soon as the plaintiff learned that the checks were not paid, and that Gill's representations were false, he telegraphed to defendants not to pay Gill, and soon after demanded the goods of defendants, who refused to give them up. The defendants proved on the trial that the plaintiff, after the commencement of this suit, brought an action against P. F. Gill and James Gill (P. F. Gill & Co.), to recover for the whole of the liquors bought by them of the plaintiff, including the ten barrels sold by them to defendants, and subsequently settled such action with the defendants therein by receiving four promissory notes for \$250 each, three of which had been paid at the time of the trial, and the fourth one was not then due.

The plaintiff proved that in the settlement it was agreed that this suit should not be included, and that the exception was omitted from the written agreement of settlement by mistake. Also, that after the settlement and payment of the three notes, it was agreed between Gill and the plaintiff that plaintiff should restore to Gill the \$750 paid and the unpaid

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note, and that the agreement for settlement should be surrendered by Gill.

The court ruled and held that a settlement having been made for a portion of the goods, this action could not be sustained, and directed a verdict for the defendants, to which the plaintiff excepted.

The plaintiff asked for a submission of the case to the jury upon the evidence, which was denied, and plaintiff excepted.

I think the court was right in directing a verdict for the defendants.

The commencement of the suit by the plaintiff against the Gills for the purchase money of the whole bill of liquors sold them, including those in question in this suit, was an act in affirmance of the sale to them; and the subsequent settlement of that suit, and the receiving of a portion of the consideration of the settlement, was also in affirmance of the sale. The subsequent *agreement* to *rescind* the settlement was not a *rescission*.

The plaintiff stood at the trial seeking to recover from the defendants a portion of the same goods, which he had sold to the Gills, on the ground of the invalidity of that sale by reason of fraud, although he had affirmed the sale, and had in his hands a portion of the purchase money thereof. The fact that in the settlement, the subject-matter of this suit was excepted, does not help the plaintiff, for he could not rescind in part and affirm as to the residue. (*Voorhies v. Earl*, 2 Hill, 288; *Wheaton v. Baker*, 14 Barb., 594; *Goelth v. White*, 35 Barb., 76; *Abbott v. Draper*, 4 Denio, 51; *Stevens v. Hyde*, 32 Barb., 171.)

The plaintiff's counsel insists that the plaintiff did promptly elect to disaffirm the sale by notifying defendants not to pay the Gills for these liquors, and by demanding them of defendants as his own, on the ground of fraud by Gill in the purchase, and that this was an election which fixed the rights of the parties, so that his subsequent action against the Gills for the price did not operate as an affirmance, his right to affirm being gone, and cites *Morris v. Rexford* (18 N. Y. R., 552,

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557). There is no doubt that a disaffirmance of a contract once effected, is a bar to a subsequent suit upon it, or, in the language of the court, in *Morris v. Rexford*, "The law tolerates no such absurdity as a seizure of goods by a person claiming that he has never sold them, and an action by the same person, founded on the sale and delivery of the same goods, for the recovery of the price. In peculiar circumstances a party may take either one of these courses; but *having rightfully made his choice*, the right to follow the other is extinct and gone." In regard to the choice thus made, the case shows that in order thus to fix the rights of the parties, it must be one which the party making it had the right to make; and it is apparent, also, that it must be effectually made; that is, everything necessary to effectuate the choice must be done; so that if no right of election existed the vendor would not be barred by an action for the goods from subsequently suing for the price. And so, if a complete rescission or disaffirmance is not made, the attempted disaffirmance would not bar a recovery of the price. This principle is entirely consistent with the case just cited, and I think is legitimately deducible from it.

The principle is, that a contract is extinguished by its rescission; unless, therefore, a rescission has been effected, the contract remains, and may be sued upon.

Now did the plaintiff, prior to his suit against the Gills, for the price, actually rescind the contract of sale?

"A party who would disaffirm a fraudulent contract must act promptly on discovering a fraud, and he must return or offer to return whatever he has received upon it. He cannot retain what he has received if it is of any value and proceed to recover the property fraudulently purchased of him. He must rescind the contract *in toto*, and thus place the party in the position he was in before the sale." (*Wheaton v. Baker*, *supra*, and cases there cited.)

The attempt to recover back these ten barrels of spirits from defendants, who were no parties to the contract, either by a demand or a suit, was no rescission of the contract. No

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notice of disaffirmance to the Gills or demand of the residue of the spirits of them was shown, and no return or offer to return to them the protested checks of Wood, was ever made. The most that can be claimed in behalf of a disaffirmance is a partial one, a disaffirmance as to the ten barrels sold by the Gills to defendants; as to the residue, none whatever is shown to have been attempted. As already shown, the disaffirmance, to be effectual, must be of the whole contract, and relate to all the goods. As was said by NELSON, Ch. J., and concurred in by BRONSON, J., in *Voorhies v. Earl*, "though fraud in the sale was shown, the plaintiff could not rescind in part; and not having attempted to rescind *in toto*, was confined to his remedy upon the contract of sale." In order to a rescission in this case, it was incumbent on the plaintiff to return or offer to return the checks received by him. It cannot be assumed that these were worthless. The most that the plaintiff proved on that subject was that Wood had no funds in the bank on which they were drawn, and that the witness called did not know whether or not he had any property. These checks were payable to P. F. Gill & Co. or order, and indorsed by them. It is not shown that they were irresponsible. Plaintiff held then the paper of Wood and of the Gills, given him on the purchase, which neither before or at the trial did he return or offer to return. Clearly, therefore, he has never effectually disaffirmed the sale. (*Wheaton v. Baker, supra*; *Stevens v. Hyde*, 32 Barb., 171; *Fisher v. Fredenhall*, 21 Barb., 82; *Nichols v. Michael*, 23 N. Y. R., 264.)

The plaintiff's counsel cites *Pearse v. Pettis* (47 Barb., 276), to the position that his demand of the spirits of the defendants was a rescission of the contract of sale. That case, I think, does not conflict with what is above said in support of an affirmance of the holding at the circuit. Neither the decision nor the *dicta* in that case go so far as to hold that the demand of a small portion of the goods, fraudulently obtained of a vendor of the fraudulent purchaser is sufficient to constitute a rescission of the contract of sale to the original

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purchaser, when no demand has been made of the larger portion from the fraudulent purchaser, or notice of rescission given to him, or any other act done or transaction had with him looking to a rescission of the contract. In *Pease v. Pettis*, the vendor of the fraudulent purchaser had the entire property purchased. The original purchaser had none of it, and the *decision* in the case is only to the effect that the return of the \$300, paid on the purchase, was excused in that case because in equity the fraudulent purchaser was not entitled to it, having had the use of the boat for a period more than sufficient to compensate for it, and that the case was taken from the general rule requiring the return of what had been paid. This is the whole of the *decision*, that the return of the money paid upon the sale was not in that case necessary to a rescission of the contract of sale, that such return was excused by the circumstances of the case.

The case of *Stevens v. Austin* (1 Met., 557, also cited) was a case where the defendant, who purchased of the original fraudulent purchaser, had the entire property, a wagon, and when also, there had been no delivery by the plaintiff to the original purchaser. In both cases the rule that the rescission must extend to the entire contract, was recognized. In the case at bar, that rule is entirely ignored and contravened by the plaintiff's argument. Not only did the plaintiff fail to disaffirm the contract as to the Gills and the large portion of the spirits kept by them, but so stood upon the contract with them, that he afterward sued them for the price, and then settled the suit for a consideration, which was paid.

It is very clear, I think, that no such disaffirmance of the contract had been made by the plaintiff as prevented him from maintaining his suit against the Gills; as to them, he had never disaffirmed, and, consequently, there had been no disaffirmance *in toto*. The result is, the *contract* had not been disaffirmed. Not having disaffirmed the sale before the suit against the Gills, for the price, that suit, and the subsequent settlement of it, for a consideration received, effectually

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barred the plaintiff from a judgment in this suit. (*Morris v. Rexford, supra.*)

Although the suit against the Gills was brought after this suit was at issue, no question of pleading is made in regard to the proof of that suit. The only objection to the evidence was on the ground of its immateriality. That it was material, has been already shown. In the view above taken, there was nothing for the jury to decide. The motion for a new trial should be denied, with costs, and judgment rendered on the verdict for the defendant.

Motion denied.

WILLIAM P. VAN RENSSELAER, Respondent, v. WILLIAM
WITBECK, Appellant.

(GENERAL TERM, THIRD DEPARTMENT, JULY, 1870.)

Two justices of the General Term may hold a term and hear and decide an appeal in which the remaining justice is incompetent to sit.

And, it seems, in the absence of the presiding justice, the two associate justices may hold a General Term.

And that unless there is a failure to agree upon a decision of the appeal by two appellate justices in the department where the judgment or order appealed from is entered, there is no authority for a hearing of the appeal in any other department.

A few days after the sheriff had executed an *alias* execution upon a judgment for possession of real property, the defendant therein regained possession; and the *alias* writ being unreturned, the plaintiff, on its return day, upon order to show cause, obtained an order for a *pluries* execution on the judgment.—*Held*, on appeal, that the writ was properly allowed.

It seems that it would have been otherwise if the *alias* writ had been returned satisfied.

After six months are elapsed from the delivery of possession of demised premises, under an execution upon a judgment in ejectment in favor of the landlord, the tenant's right of redemption under the statute (2 R. S., 506, § 33) cannot be revived by the issuing of a new writ upon the judgment made necessary by his unlawfully re-entering upon the premises.

And it seems that the tenant cannot enlarge the time allowed him for redemp

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tion under the statute (*id.*), by wrongfully retaking possession before the original execution runs out, and thus rendering its execution incomplete. The provisions of the article of the Revised Statutes, entitled "Of the recovery of possession of demised premises for non-payment of rent, by ejectment," are applicable to the so-called manor leases.

Nor is the relief upon judgment in ejectment upon such leases, limited at common law to a right to hold possession of the land for time sufficient to satisfy the rent in arrear, costs, etc.

THIS was an appeal from an order for a *pluries* execution, granted upon motion at Special Term, upon an order to show cause. The facts are stated in the opinion of the court.

R. A. Parmenter, for the appellant.

Samuel Hand, for the respondent.

Present—POTTER and PARKER, JJ.

By the Court—PARKER, J. This is an appeal from an order made at Special Term, held by Mr. Justice MILLER, on the 29th day of March, 1870, at the city hall, in the city of Albany, authorizing the issuing of a *pluries* execution to the sheriff of the county of Rensselaer, commanding him to deliver the possession of the premises described in the complaint and judgment in the action, to the plaintiff.

The appeal having been noticed for argument at the General Term of the third department, held on the first Tuesday of July, 1870, at Plattsburgh, in the county of Clinton, and the argument thereof being moved, Mr. Justice MILLER being the presiding justice of such General Term and in attendance thereat, and being incompetent to sit in review of the decision so made by him at Special Term, retired from the bench, leaving the two associate justices only, to hold the General Term and hear the said appeal. The defendant's counsel therefore objected, that a General Term could not be held by two justices, and that he ought not to be compelled to argue his said appeal before said two associate justices as constituting the General Term. Pursuant to their suggestion, that his

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objection would be examined with the main question, and that he might proceed provisionally to the argument, both the preliminary and main questions were argued together.

The first question to be decided is, whether two justices of the General Term can hold a term and hear a case in which the other justice is incompetent to sit.

Section 8 of the judiciary article of the Constitution provides that no justice shall sit at a General Term in review of a decision made by him, or by any court of which he was at the time a sitting member.

By section 7 of said article it is provided, that the General Term shall consist of a presiding justice and *not more* than three other justices. The Constitution contains no prohibition against constituting a General Term of two justices. The act of April 27, 1870, relating to the Supreme Court (chap. 408, Sess. Laws of 1870) does not in terms require the presence of three justices to hold a General Term.

Section 3 of that act requires the governor to designate a presiding justice and two associate justices for such department, to compose the General Term therein, and then, in section 4, it is provided as follows: "In case no presiding justice shall be present at the time and place appointed for holding a General Term, the associate justice present having the shortest time to serve shall *act as presiding justice* until the presiding justice shall attend." Here is a very distinct authority for the holding of the General Term by the two associate justices in the absence of the presiding justice.

Section 6 requires the concurrence of two justices to pronounce a decision, and then provides that "if two shall not concur, a reargument may be ordered. In case of such disagreement *when any one of the three justices shall not be qualified to sit*, the cause may be directed to be heard in another department." This provision clearly implies the right of the two justices not disqualified to sit, to hear and decide the case. They must sit and hear it, before there can be the disagreement mentioned. Of course, they hold the General Term in so doing, and can decide the cause; and in case they

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do not concur in a decision, they may direct it to be heard *in another department*. There is no provision for such direction when the General Term is held by three justices.

Again, in section 10, is this provision: "All appeals and other matters proper to be brought before any General Term shall be heard and determined in the department in which the judgment or order appealed from shall be entered, or in which the matter brought up arose, *unless two of the General Term justices in such department, shall be incapable of sitting on the appeal or acting in the matter*; in which case the appeal or other matter shall be ordered to be heard in some other department." Here, also, the authority of two justices to sit and hear the appeal is recognized and implied. The appeal or other matter is to be heard in the department where it belongs, unless two of the General Term justices of that department are disqualified. If only one is disqualified, it is not to be sent from the department, but to be heard in it by the other two.

From all these provisions of the statute it is clear, that this appeal from the decision made by the presiding justice of this department, when sitting in Special Term, can be heard and decided in the department by the two associate justices thereof, and cannot in the first instance, nor until a disagreement shall have occurred between such two associate justices be heard in any other department.

The question presented upon this appeal, arises in an action of ejectment to recover premises held by the defendant under a grant in fee reserving rent, for non-payment of such rent.

Judgment was obtained by the plaintiff for the recovery of the premises, on the 17th of July, 1863. On the 10th of May, 1867, an execution for the delivery of possession of the premises to the plaintiff was issued to the sheriff of the county of Rensselaer, and was executed by him, by putting the plaintiff in possession. Afterward, the plaintiff, upon motion on due notice to the defendant, obtained an order at Special Term for an *alias* execution, which was issued on the

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26th day of July, 1869, to the sheriff of said county of Rensselaer, who on the same day executed the same, by putting plaintiff in possession of said premises. Almost immediately thereafter, and prior to the 26th day of July, aforesaid, the defendant regained possession from the agent, who was left in possession by the plaintiff, and thereupon the sheriff, by his deputy, on the 26th day of July, aforesaid, by virtue of the authority of said execution, attempted again to put the plaintiff in possession; but said deputy was violently resisted, and prevented from so doing by the defendant, and others, his aiders and abettors, and was in making such attempt, mortally wounded, and has since died from the effects of the wound then received, and the defendant was in consequence left in possession. There is no pretence that the *alias* writ has been returned.

In September, 1869, the defendant tendered to the plaintiff's attorney, all the rent due and payable under the original indenture, and all costs and charges incurred by the plaintiff, which had not theretofore been paid, in order to redeem said premises from said judgment, and to entitle him to hold and possess the same, according to the terms of said original indenture, which offer was refused by the attorney.

After the return day of the *alias* execution, and after such offer and refusal, an order was obtained by the plaintiff, requiring the defendant to show cause at a Special Term named, why a *pluries* execution should not issue. The Special Term, at the return day of the order, granted the plaintiff's motion for a *pluries* execution, and from the order granting such motion this appeal is taken. All that appears in the case, in regard to the execution of the first writ of possession is material to the question before us only so far as it bears upon the sufficiency of the redemption claimed by the defendant. We cannot, upon this appeal, examine into correctness of the order allowing the *alias* execution, but must assume, as the Special Term was bound to assume, that it was properly made, and that the *alias* was properly issued. This execution, for the purposes of the question before us,

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was the first one in the case. It has not been returned, and though executed on the 20th of July, the day of its issue, by putting plaintiff in possession, previous to the 26th of the same month, the defendant had entered again upon the plaintiff's possession without his consent, and was forcibly keeping him out.

Under the practice before the Code, there is no doubt that, in such a case, a new *habere facias possessionem* would have been granted. In *Jackson v. Stiles* (9 J. R., 391), a writ of *habere facias possessionem* was issued on a judgment in ejectment, returnable in February, 1811, which was executed but never returned. In May, 1812, the plaintiff obtained a rule of the court granting leave to issue another *habere facias possessionem* on the same judgment, the tenants having in the meantime retaken possession of the premises. On motion to vacate the rule and set aside the writ, it was held that the practice was correct. The court says: "The facts stated show that the party has never had the full fruit of his judgment and justice, and equity require that he should have it."

In *Jackson v. Hawley* (11 Wend., 182), it was held, that when, in ejectment, a writ of *habere facias possessionem* had been executed by putting the plaintiff into possession of the premises claimed, and the plaintiff, after remaining in possession four or five days, was dispossessed by a person claiming under the defendant's title, an *alias* would be awarded, although the return day of the first writ had not arrived.

There would seem to be less reason for granting the *alias* in such case, than where the return day of the writ has passed, for, in accordance with the reasoning of the court in the case, it might well have been objected, that, until the return day of the writ it might be used to restore the plaintiff to the possession. But after the return day and before the return of the writ to the clerk's office no reason appears against the propriety of the *alias*. If the writ has been returned satisfied, that would be a reason for refusing a new writ, while such return should stand upon the record. But when there is, in fact, no satisfaction and no return on file, and the party has

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never had the full fruit of his judgment, as was said by the court in *Jackson v. Stiles* (*supra*), justice and equity require that he should have it. True, SAVAGE, Ch. J., in *Jackson v. Hawley*, cites the case of *Doe v. Roe* (1 Taunt., 55), where the court held that an *alias* could issue *after a writ executed*. But he went on to say in respect to it: "This last case is certainly not obligatory upon us, and all the older cases argue that where the entry upon the plaintiff is before the return of the writ, and such entry is by the tenant or under his title, the plaintiff is entitled to a new writ."

The learned chief justice is fully sustained by the "older cases" cited by plaintiff's counsel. (See *Radcliffe v. Tate*, 1 Keb., 776; *Devereaux v. Underhill*, 2 id., 245; *Pierson v. Taverner*, 1 Koll's Rep., 353; *Molineux v. Fulham*, Palmer's Rep., 289.)

There is no specific provision in the Code authorizing or denying a new execution in a case like this; but by section 469, the practice of the courts, not inconsistent with the provisions of the Code, is continued in force. The practice sanctioned by the cases of *Jackson v. Stiles* and *Jackson v. Hawley* above referred to, is not inconsistent with any provision of the Code, but entirely consistent with its spirit and applicable in practice to its requirements; and every reason, both on principle and authority, is in favor of its continuance.

The defendant's counsel raises another question upon the fact of defendant's offer in September, 1869, to pay the plaintiff all the rent due under the original indenture, and all costs and charges incurred by him, claiming that he was within the statute authorizing a redemption from the judgment by such payment within six months after writ of possession executed. (2 R. S., 506, § 33, 1st ed.)

The section is as follows: "At any time within six months after possession of the demised premises shall have been taken by the landlord under any execution issued upon a judgment obtained by him in any such action of ejectment, the lessee of such demised premises, his assignees or personal representatives may pay or tender to the lessor, his personal repre-

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sentatives or attorney all the rent in arrear at the time of such payment, and all costs and charges incurred by the lessor; and in such case all further proceedings in said cause shall cease, and such premises shall be restored to the lessee, who shall hold and enjoy the demised premises without any new lease thereof, according to the terms of the original demise."

It appears in the case, and is claimed by both parties, that the first writ of possession was executed by delivering possession of the premises recovered to the plaintiff on the 10th day of May, 1867, and that he, by his tenant at will, remained in possession until April, 1868. The six months given to the defendant by the statute in which to redeem by paying the rent in arrear and the costs, began on the 10th day of May, 1867, and had expired before the tender was made. True, it is on the ground that the execution of the writ had become incomplete, by the subsequent action of the defendant, that a new writ is allowable, but it does not lie with the defendant to claim an extension of the time allowed him for redemption, arising from his wrongful act in entering upon the plaintiff's possession without his consent. Indeed, in this case, the plaintiff remained in possession from the 10th day of May, 1867, to April, 1868, so that the six months had already expired before the defendant's re-entry. Clearly, he does not bring himself within the protection of the statute.

The claim by the defendant's counsel, that because the rent in this case is a *rent charge*, and not *rent service*, a different rule applies, and the landlord's judgment entitles him to hold possession only long enough to satisfy the rent in arrear and the costs, cannot be sustained. The paragraph in Cruise's Digest, upon which he founds this claim, has no application to the case (3 Cruise, 331, § 76), and besides it cannot now be doubted that the provisions of the article of the Revised Statutes entitled "Of the recovery of possession of demised premises for non-payment of rent, by ejectment" (2 R. S., 505, 508, 1st ed.), apply to these leases in fee, or manor leases, as they have been called.

The thirty-fourth section of that article provides, that "in

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case the said rent and arrears and full costs shall remain unpaid for six months after the execution issued upon any judgment in ejectment shall have been executed, the lessee and his assigns * * shall be barred and foreclosed from all relief or remedy in law or equity (except for any error in the record or proceedings), and the said lessor or landlord *shall from thenceforth hold* the said demised premises free and discharged from such lease or demise."

The judgment gave the plaintiff the absolute possession of the premises, without the limitation claimed by the defendant. For this reason, also, the claim is inadmissible to prevent a full execution of the judgment.

The order appealed from must be affirmed, with ten dollars costs.

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MARY BRICKNER, Administratrix, &c., Appellant, v. THE
NEW YORK CENTRAL RAILROAD COMPANY, Respondent.

(GENERAL TERM, THIRD DEPARTMENT, JULY, 1870.)

The plaintiff's intestate, employed by the defendant as a carpenter, was directed by the foreman of his gang to go, for the purpose of his labor, on a scaffolding erected in one of the defendant's shops, and which was apparently safe and properly constructed; but was, in fact, unsafe and dangerous, and had been constructed by unskilled and wholly incompetent persons, and of poor and insufficient material; and on the plaintiff's intestate stepping thereon it gave way, causing injuries which resulted in his death.—*Held*, that in the absence of proof by whom the persons constructing the scaffolding had been selected, or under whose directions it had been constructed, the presumption was that such persons had been selected by, and the scaffolding erected under, the direction of the defendant; that on the foregoing facts appearing in evidence, the burden was on defendant to show that competent persons had been selected, or the scaffolding constructed in a proper manner; and that it was error to nonsuit the plaintiff, on the ground that the injury to the deceased was caused by the negligence of a fellow servant, or that no knowledge of any incompetency of the defendant's servants, or of any defectiveness of the scaffold had been brought home to the defendant, or that the persons guilty of the negligence causing the injury, had not been employed by the defendant, but by a competent agent of the defendant.

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THIS action was brought to recover damages for injuries received by the plaintiff, while in the employ of the defendant and in obeying the orders of one Westman, the defendant's employee, and was tried at a Circuit Court in Albany county in May, 1869. The facts are stated in the opinion. At the close of the testimony the plaintiff was nonsuited, which nonsuit was asked by the defendant upon the following grounds :

First. That there is no evidence of any negligence, on the part of the defendant, that caused or contributed to the injury of the deceased.

1st. There is no evidence that Westman was incompetent.

2d. If he was, not having been employed by defendant, but by a competent agent of the defendant, defendant is not responsible for the results of this incompetency.

3d. There is no evidence that Westman's incompetency or intemperance were in any way the cause of the improper construction of the scaffold.

4th. There is no evidence that Westman was in any respect at fault in relation to the construction of the scaffold.

5th. There is no evidence that the men who actually put up the scaffold, were incompetent.

6th. No notice of the defectiveness of the scaffold is brought home to the defendant, or to any of its officers or directors.

7th. There is no evidence that sufficient materials were not furnished by the defendant for a safe and good scaffold ; on the other hand, it appears affirmatively, that sufficient materials were furnished.

8th. No notice or knowledge of Westman's alleged intemperance, or Churchill's or Forman's alleged incompetency, or of any defect in the scaffold, is brought home to any officer or director of the company.

Second. That the deceased knew, or had means of knowledge, as to Westman's alleged intemperance, and as to the alleged incompetency of Forman and Churchill, and as to the defectiveness of the scaffold.

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Third. The injury to the deceased was caused by the negligence of a fellow servant in the same general employment.

Fourth. The negligence of the deceased himself contributed to his injury.

Fifth. There is no material question of fact in the case on which there is conflicting evidence to submit to the jury.

Sixth. No cause of action has been proved.

The plaintiff's counsel submitted the following, as the grounds on which they claimed to recover:

First. That Westman was incompetent, and that notice thereof was brought home to Colby, his superior, who should have discharged him, and that notice to Colby was notice to the defendant.

Second. That this scaffold was a structure or machine furnished by this company to be used by these men in the course of their employment; and this man had right to assume that the company would exercise ordinary care and skill in making that safe and secure.

Third. That the boys who built that scaffold were incompetent and improper servants or agents for that purpose; and the evidence shows that they were in the general employ of the company for general purposes, and it must be presumed that they were there for this purpose among others.

Plaintiff's counsel requested the court to submit to the jury to find:

1st. Whether Westman was addicted to habits of intoxication to such an extent as to render him incompetent for his place; which request was denied, and the plaintiff excepted.

2d. Whether notice of the fact of Westman's habits of intoxication was brought home to the company; which request was denied, and the plaintiff excepted.

3d. Whether this scaffold was an unsafe structure; which request was denied, and the plaintiff excepted.

4th. Whether this scaffold was built under the direction of, and by this company; which request was denied, and the plaintiff excepted.

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5th. The plaintiff's counsel requested the court to submit the whole case to the jury, on the testimony; which request was denied, and the plaintiff excepted.

The court thereupon granted the defendant's motion for a nonsuit, and the plaintiff duly excepted thereto.

Isaac Lawson, for the plaintiff.

Matthew Hale, for the defendant.

Present—POTTER and PARKER, JJ.

By the Court—POTTER, J. A review of this case requires the statement of the leading facts proved on the trial. The plaintiff's intestate, Frederick Brickner, was a carpenter, in the employ of the defendant, at West Albany, at the time of the accident which resulted in his death, and which occurred in October, 1867. Brickner was at the time, and for some days previous, with three others, had been, engaged in putting sky-lights into the roof of the shop of the defendants; and, to effect this object, had built scaffolding below the roof, under the openings for the sky-lights, at a height of some twenty-five feet above the floor or ground of the shop. Three such sky-lights were to be constructed; and to do this, holes had to be cut through the roof, of the size of the sky-light. The carpenters had to stand upon the scaffold while at work, and while raising up the timbers from below with which to construct them, laying the timbers when raised upon the scaffolds. The first two of these scaffolds were constructed by three carpenters, of which Brickner was one. These two scaffolds answered all the purposes of their construction. The third scaffold, which was built for the like purpose of being used for the carpenters to stand upon while constructing the third sky-light, was built by two young men of the ages of sixteen and eighteen, who were in the employ of the defendant, and who had little (if any) knowledge of the trade, one of whom had worked at the business but about two months.

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When the three carpenters had finished the second sky-light, they were ordered by the defendant's foreman or boss carpenter, whose name was Westman, to go to work upon the third. The carpenters found the third scaffold constructed. They proceeded from the second sky-light, over the roof of the building, and stepped down upon the scaffold for the third sky-light through the hole cut in the roof for the sky-light, this being the only way to get upon the scaffold. Seen from above, this scaffold was, in its appearance, like the others which had been constructed by the carpenters; it was covered closely with boards cut out of the roof. Three of the carpenters got on this scaffold, and when the fourth, who was the plaintiff's intestate, stepped upon the scaffold, it gave way; he fell to the ground, receiving injuries which resulted in his death. The timber with which this scaffold was constructed was insufficient in size, strength or quality for a scaffold; and one of the sticks upon which boards were placed was cross-grained hemlock. There is the absence of evidence in the case that either of the directors of the defendant had any personal supervision, or gave directions in regard to any of the work at West Albany.

The directing power, there, so far as the proof shows it, is, that one Colby was master mechanic, under one Jones, and one Westman was boss of the gang of carpenters. That Jones and Colby were competent men, but there was proof that Westman indulged in habits of drinking, and was occasionally intoxicated; that Colby had threatened to dismiss him for that reason; and some proof was given, that he was intoxicated at the time he ordered the carpenters upon the defective scaffold. The evidence is left uncertain, by whose direction it was, that these two boys constructed the defective scaffold. The carpenters who entered upon it, did not know. They were sent there to work upon it by Westman, who was the immediate boss of the gang of carpenters, and directed their work. Upon this statement, the first question, in fact, the only question, as it seems to me, is, was there any fact in the case, to be submitted to the jury? This is a question of

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law. The institutions of railroads in this country, as the great medium of individual and commercial transition, has introduced into our jurisprudence, new subjects of discussion in, and adjudications by the courts, as to the degree of care, caution, and diligence, demanded respectively, of master and servant, employer and employee, toward the other, as well as the degree of misconduct or negligence, which creates liability upon the one, or which estops the other from the making a claim for damages for injuries received, while engaged in the employment of such other. To a certain extent, in given cases, we may regard the law as settled by our highest courts; but the ever varying cases, in fact, and feature, presented to the courts at *nisi prius*, calls upon that court, and the court of review, in the examination of a case thus changed in its presentation from every other, to apply to it, first, what is the settled law of general and particular cases. And to that portion which appears to be novel, or a variation from settled adjudications, to apply such general principles of common law as seem to be demanded by it.

In this case, we may perhaps assume, as a settled general rule, "that a master is not responsible to those in his employ, for injuries resulting from the negligence, carelessness, or misconduct, of a fellow servant engaged in the same general business." (*Wright v. N. Y. Cent. R. R. Co.*, 25 N. Y., 564, and cases cited.) As also, "the rule exempting the master, is the same, although the grades of the servant or employes are different, and the person injured is inferior in rank, and may be subject to the directions and general control of him, by whose act the injury is caused." (*Id.*, 565.) A later case in the same court (*Warner v. The Erie Railway Co.*, 39 N. Y., 471) lays down the following rule, which is not in conflict with *Wright v. N. Y. Cent. R. R. Co.*, *supra*, viz.: "The only ground, then, which the law recognizes, of liability on the part of the defendant is, that which arises from personal negligence, or such want of care, and prudence in the management of its affairs, or the selection of its agents, or appliances, the omission of which occasioned

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the injury, and which, if they had been exercised, would have averted it."

The principle of this proposition is nearly identical with that contained in *Snow v. Housatonic R. R. Co.* (8 Allen, 444, 5), as follows: "Now, while it is true, on the one hand, that a workman or servant, on entering into an employment, by implication agrees that he will undertake the ordinary risks incident to the service in which he is to be engaged, among which is the negligence of other servants employed in similar services by the same master, it is also true, on the other hand, that the employer or master impliedly contracts that he will use due care in engaging the services of those who are reasonably fit and competent for the performance of their respective duties in the common service, and will also take due precaution to adopt and use such machinery, apparatus, tools, appliances and means, as are suitable and proper for the prosecution of the business in which his servants are engaged, with a reasonable degree of safety to life, and security against injury. The case of *Noyes v. Smith* (28 Vt. R., 63) is also a case adopting the same principle; and while it recognizes fully the rule "that a master is not liable to his servant for an injury occasioned by the negligence of a fellow servant in the course of their common employment," the court says "such rule has no application *where there has been actual fault or negligence on the part of the master, either in the act from which the injury arose, or in the selection or employment of the agent which caused the injury.*" This opinion is sustained by citing to its support the case of *Hutchinson v. Railway Co.* (5 Wells. Hurl. & Gordon, 352), which also thus qualifies the rule: "That the master shall have taken due care not to expose his servant to unreasonable risks." The Vermont court then lay down this rule: "The master, in relation to fellow servants, is bound to exercise diligence and care that he brings into his service only such as are capable, safe and trustworthy; and for any neglect in exercising that diligence, he is liable to his servant for injuries sustained from that neglect." It is not necessary that he should know

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that they are unsafe and incapable. It is sufficient *that he would have known it if he had exercised reasonable care and diligence.* (See cases cited therein.) Some cases are found that hold the master is liable where he either knows or *ought to know* the dangerous character of the machinery or appliances furnished to the servant. "*He is chargeable with knowledge of the probable consequences of the acts he directed or of which he was cognizant.*" (*Ryan v. Fowler*, 24 N. Y., 413; *Wright v. N. Y. Cen. R. R. Co.*, *supra*, 566; 8 Allen, 441.)

In the case of *Gilman v. The Eastern R. R. Corporation* (10 Allen, 233, 239), an employe of the defendant brought his action for an injury occasioned by the negligence of a switchman in failing properly to adjust the switch upon the track. The court held, that the plaintiff, being a fellow servant in the employ of the same railroad company, could not have recovered of their common master; but they add: "The evidence offered by the plaintiff at the trial was competent to show that the defendant, *knowingly* or in *ignorance*, caused by their own negligence, employed an habitual drunkard as a switchman and thereby occasioned the accident. Of the sufficiency of this evidence, a jury must judge. If the plaintiff can satisfy them that such misconduct or negligence in the defendant caused the injury, and that he himself used due care, he may maintain his action." In the same case they say: "It is well settled, both in England and America, that a master is bound to use ordinary care in providing his structures and engines, and in selecting his servants, and is liable to any of his fellow servants for his negligence in this regard." (See authorities cited in this case on page 238, and *Tarrant v. Webb*, 18 C. B. R., 797.)

If the case we are reviewing depended upon the question, whether a fellow servant could maintain an action against the common master, for the negligence, carelessness or misconduct of a fellow servant engaged in the same general business, it would be clear that the learned judge correctly ordered a nonsuit at the trial. This case, however, has evidence in it tending to sustain a different basis of right to recover, to wit:

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The negligence of the defendant, in erecting an unsafe and dangerous structure, upon which the plaintiff was placed, or directed to go, to perform his labor; and the negligence of the defendant, in selecting proper and competent servants, or knowingly keeping intemperate and incompetent servants in their employ, by reason of which the plaintiff's intestate was injured. Upon this feature of the case we think the learned judge was in error, in not submitting the case to the jury, with proper instructions as to the law of the case, or with proper issues of fact to be found by them, upon which the law could be declared.

There was evidence in this case, of the incompetency of the persons who constructed the scaffold in question; the fall of which, caused the death of the plaintiff's intestate. They were mere boys, sixteen and eighteen years of age, unlearned in the trade of carpenters, and as a natural consequence, inexperienced, and unacquainted with the strength and support necessary for such a structure. In the absence of proof, as to who directed them to construct this scaffold, the presumption must be, that it was the defendant, or the directing power of the defendant; some one who had the authority to direct. If the presumption should be, that it was Westman, the boss carpenter, then the direction was given by one as to whose competency, by reason of his habits of intemperance, was a question of fact, properly for a jury. It is entirely clear, that the scaffold, as a structure, implement, facility, or appliance by whatever name it may be called, was an unsafe and dangerous one; it was constructed by incompetent persons, and of poor and insufficient materials. When this was proved, I think, the burden was upon the defendant of showing, at least, that it was constructed by a competent director of work, or competent fellow servant. If the defendant, as master, directed these incompetent boys to construct this scaffold, then they are responsible for the consequences.

Perhaps we have gone as far as necessary, to show that it was error in the judge, to take this case from the jury. I do not understand it to be urged as a ground for sustaining the

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nonsuit, that the plaintiff's intestate had been guilty of contributing negligence on his part; or, that the learned judge put his decision on that ground. Upon the argument of this case, the main point relied upon to sustain the ruling of the learned judge, was that no negligence was brought home to the defendant. That the business of employing and discharging men was left to Colby and Jones; and they being competent, whatever resulted from their negligence, is to be accounted the negligence of a fellow servant.

Though the case does not inform us *who* employed, either Jones, Colby, or Westman, as agents or operatives, it does appear that, among themselves, they took some rank, in the order of Jones, Colby and Westman. They were all called bosses by the workmen, which is doubtless a title of superiority, perhaps each in a different department. Jones was highest, but Colby employed and discharged men; and Westman was in charge of, and directed the gang of carpenters as to their work. As none but the principal has the right, to employ agents and servants, without a delegation of the power to do so, the presumption must be, in this case, in the absence of other evidence, that these three bosses were employed by the defendants, and each had delegated to him, power to direct.

It is claimed, that in cases of corporations who can only act by agents, that the directors may be regarded as the master, or principals, and that all others, all persons in their employ, whatever may be their rank, or the character of their employment, or duties, whether general superintendent, or the lowest grade of menial laborers; all stand upon an equality of co-laborers, or co-employees, as regards the question of negligence toward each other. This may be the rule where the executive power, the directing and superintending duties of the corporation, are performed by the directors in person, as was the case of *Warner v. Erie Railway Co.*, *supra*. I have not yet learned from any respectable adjudications, that a railroad, or other corporation, by appointing a superintending agent to transact all *executive duties*, and

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surrendering to him, all right to perform such duties, retaining and exercising no power to discharge such duties themselves, can escape all legal liability as master; that the superintending and controlling agent in such case can be held to be, only a mere fellow servant, and co-laborer; the equal with all other employes of the corporation; or, in other words, that by this device, corporations can avoid having a master, to whom negligence or knowledge of defective, or insufficient machinery, implements, or appliances, can be brought home, so as to create liabilities. Such a doctrine is simply monstrous. Corporations would thus be absolved from all possible liability, and the sound old maxim, "*Qui facit per alium facit per se*," would be abrogated. (See *Patterson v. Wallace*, 28 Eng. Law and Equity, 55.)

A corporation cannot act personally. It requires some person to superintend structures, to purchase and control the running of cars, to employ and discharge men, and provide all needful appliances. This can only be done by agents. When the directors themselves personally act as such agents, they are the representatives of the corporation. *They are then* the executive head or master. Their acts are the acts of the corporation. The duties above described are the duties of the corporation. When these directors appoint some person other than themselves to superintend and perform all these executive duties for them, then such appointees equally with themselves represent the corporation as master in all those respects. And though in the performance of these executive duties he may be and is a servant of the corporation, he is not in those respects a co-servant, a co-laborer, a co-employee, in the common acceptation of those terms, any more than is a director, who exercises the same authority. Though such superintendents may also labor, like other co-laborers and he may be in that respect a co-laborer, and his negligence as such co-laborer, when acting only as a laborer, may be likened to that of any other, yet, when by appointment of the master, he exercises *the executive duties of master*, as in the employment of servants, in the selection for adoption of

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the machinery, apparatus, tools, structures, appliances and means suitable and proper for the use of other and subordinate servants, then his acts are executive acts, are the acts of a master; and then the corporation are responsible that he shall act with a reasonable degree of care for the safety, security and life of the other persons in their employ. These executive duties may also be distributed to different heads of different departments, so that each superintendent within his sphere may represent the corporation as master. In controlling and directing structures, in employing and dismissing operatives, in selecting machinery and tools, thus he speaks the language of a master. Then he issues *their* orders to *their* operatives. Then he is the mouthpiece and interpreter of their will. Their voice, which is silent, is spoken by him. He then only speaks their executive will, not the irresponsible will of a fellow workman or co-laborer. The corporation can speak and act in no other way. His executive acts are their acts. His negligence is their negligence. His control, their control. He has in this executive duty no equal. He is not, while in the performance of these executive duties, only the equal of the common co-laborer or co-servant. I do not discover in this view anything in conflict with the cases of *Wright v. N. Y. Cen. R. R. Co.* or *Warner v. The Erie Railway Co.* Those cases have not held, that when a corporation exercises its executive power by an agent or superintendent, that they are not liable for his negligence as such, because he is only a servant of the corporation. That step in advance is yet to be taken by the courts in this country. Before it is taken, I think the court will take into consideration the consequences of such a rule. I doubt if they will be found inclined to open a door which should allow corporations or individuals to escape all responsibility for accidents occasioned by negligence of their executive agents, and thus suggest the expediency of managing *all* institutions in that way.

We are referred by the brief of the defendant's counsel, to two cases recently decided in the English courts. (*Gallagher v. Piper*, 16 C. B., N. S., 669, and *Wilson v. Murry*, decided

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m the House of Lords in 1868), which, it is said, held the rule that knowledge of negligence must be brought home to the defendants; and that it is not sufficient that knowledge of such negligence be brought to the defendants' general manager, if the foreman of the scaffold in the case of an insufficient scaffold. I have not had access to the books containing those holdings, and the statement from the brief does not show us, whether the master or defendants in those cases, themselves, had personal charge of their own business, or whether the whole charge of the management was committed by the master to a superintendent and general manager. That is a distinction I have regarded as important, if not controlling, and have not felt bound in this court, to adopt the rule as it is claimed. I do not think it could be endured in this country. But the negligence referred to in the English case of *Wilson v. Murry*, was the negligence of a competent and skillful workman, not the negligence which consists in employing an incompetent and unskillful one through whose incompetence the injury happened. A very clear difference.

This case shows an absence of all evidence, as to the actual power of those persons who exercised executive duties. The apparent authority, in such case, must be presumed to be the real authority. There were facts in the case that should have been presented to the jury. It was error to nonsuit.

ERRATA.

McGarry v. The People, p. 227, in paragraph 4 of the Syllabus, for "dwelling," in line 2, read "building."

Howe v. Lloyd, p. 335, in paragraph 3 of the Syllabus, the last line should read, "and the judgment was otherwise allowed to stand, without costs."

Note to the Board of Commissioners of Excise v. Willey (page 427).

The attention of the reporter has been called to an opinion of Attorney-General Champlain (published in the Albany Law Journal of November 19th, 1870), in which it is maintained that, where new boards are appointed, county boards are abolished, and have no power to prosecute for penalties; and also to the fact that, since its publication, proceedings by *quo warranto* have been taken by that officer, and are now pending, with a view to test the power of county commissioners of excise, claiming to hold office, as such, under the law of 1857, to sue for excise penalties.—REP.

Van Rensselaer v. Witbeck, p. 498, in paragraph 3 of the Syllabus, insert after the word *entered*, "where two of such justices' therein are capable of sitting on the appeal, or acting in the matter."

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ACCIDENT INSURANCE.

An insurance against "any accident while traveling by public or private conveyances provided for transportation of passengers," held not to cover accident to the insured while he is going on foot over the customary route between a steamboat landing where conveyances are to be had for hire, and a railway station, in the prosecution of, and for the purpose of continuing by rail, the journey with reference to which the insurance was taken. *Northup v. Railway Passenger Ins. Co.* 166

ACCOUNTING.

See EXECUTORS AND ADMINISTRATORS, 1 TO 7.
SURROGATE, 1.

ACCOUNT STATED.

One of two copartners advanced moneys for the firm business in excess of the amount which he had agreed to furnish therefor, and charged interest thereon upon the firm books, which, after dissolution, the firm clerk, acting for such partner and in connection with the other partner examined, and no objection was made by the latter to the charge; statements of the accounts were also presented to the latter partner, including the charge for interest, and he then made no objection; in an action by the partner who had made the advances,

for an accounting, the referees allowed the item of interest as upon an account stated.—*Held*, on appeal, that his decision should be sustained. *Lloyd v. Carrier.* 384

ACTION.

An action upon a judgment against the defendants therein, entered in form against them jointly, is presumptively an action against joint debtors. *Stahl v. Stahl.* 60

See BILLS OF EXCHANGE &C., 8, 9.
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VENDOR AND PURCHASER OF CHATTEL, 1 TO 4.

ACT OF BANKRUPTCY.

1. W. gave to S. W., his father, a mortgage on land of \$2,000, as security to that extent, against a like mortgage of \$5,000, given by the latter for a loan to W., and having paid the greater part of the latter mortgage, and being insolvent, procured an assignment of

the \$2,000 mortgage from S. W. to C., who knew of his insolvency, for the purpose of preferring a debt. Within four months after the assignment, W.'s creditors filed a petition against him in bankruptcy; C. foreclosed, purchased at the sale, and conveyed to a *bona fide* purchaser for full consideration. In an action by W.'s assignee in bankruptcy, duly appointed (who had not been made a party to the foreclosure), against C., to recover the purchase money received by him from his grantee.—*Held*, that the assignment of the \$2,000 mortgage, as to such part of the amount secured thereby, as remained unpaid of the \$5,000 mortgage was valid, but that beyond such amount, the said assignment was void under the provisions of section thirty-five of the bankrupt law; and that the plaintiff might ratify the conveyance of C., and recover the purchase money which he received thereon, less such part of the \$2,000 mortgage, as was necessary to satisfy the balance unpaid on the principal mortgage. *Winslow v. Clark*. 377

2. The evidence showing that no more than \$500 was due on the mortgage of \$5,000, and the appeal being from a judgment on a referee's report dismissing the complaint, the plaintiff was allowed to have judgment for the balance of the purchase money paid to the defendant, without costs, upon stipulating to allow a deduction of \$500 therefrom, otherwise the judgment to be affirmed with costs. *Id.*

ADVERSE PARTY.

See APPEAL, 1.

AGENT.

See PRINCIPAL AND AGENT.

AGREEMENT.

See CONTRACT.

APPEAL.

1. Every party to an action, whether as plaintiff or defendant, who has an interest in sustaining a judgment or determination appealed from, is an "adverse party" within section 327 of the Code, and, as such, is entitled to notice of appeal. *Hiscock v. Phelps*. 106
2. The several members of a firm secured certain partnership debts and liabilities by two consecutive mortgages on real estate, which stood in their names, as tenants in common, and which had been purchased and was used by them for partnership purposes. Intermediate the making of these two mortgages one of the partners executed a mortgage on his interest in the same premises, to secure an individual indebtedness contracted partly for the purpose of raising money to make up his share of the partnership capital, and partly for other purposes. The firm, as such, became insolvent; the partner executing the individual mortgage had not contributed his full share to the firm capital, and was personally insolvent; the other members had contributed their full share, and were personally solvent. The holder of the two first mentioned mortgages commenced a foreclosure, claiming for the second of them a priority over the individual mortgage, although the latter was prior in time. The solvent partners answered, and also claimed that the two mortgages, executed by all the partners, were entitled to be first satisfied, and that the individual mortgage was a lien on only one-fourth (the insolvent partner's interest) in the surplus. The insolvent did not appear, but the holder of the mortgage, made by him, claimed that his mortgage was a valid lien as of the time of its execution, and judgment having gone against him, after a trial, he appealed, but did not give notice of appeal to the partners who had answered, and in substantial accordance with whose answer judgment had been entered.—*Held*, that the partners answering had an interest adverse to the appellant in

sustaining the judgment, and were necessary parties to the appeal; that in case the judgment should be reversed, the parties not before the court would not be bound by the reversal, and plaintiff's right might be prejudiced thereby, and he had, therefore, a right to take the objection; and that it was too late to make the other defendants parties, and the appeal should be dismissed. *Id.*

8. A notice of appeal from a judgment of a justice's court, which necessarily shows the respondent how the judgment should be more favorable to the appellant, and enables the former to make the offer permitted by section 871 of the Code, is sufficient, upon the question of costs, although it does not state, *in hac verba*, that the judgment should have been "more favorable." *Fults v. Wynn.* 153

4. By taking his appeal from the judgment of a justice of the peace in form as for a new trial, the appellant does not waive the right to insist that an attachment, through which the justice took cognizance of the case, was void. Per FOSTER, J. *Stevens v. Benton.* 156

5. Or to raise in the appellate court as fully as he might if he had appealed on questions of law only, all questions properly raised in the court below, excepting those to proceedings which took place on the trial of the action. *Id.*

6. On a trial upon appeal in the County Court, the jury gave a verdict for the plaintiff for \$284.37, upon which he entered judgment with costs in the aggregate for \$519.72. The complaint below demanded \$200, and it did not appear whether it had been amended, and no question was raised upon rendition of the verdict or otherwise in respect to the amount thereof. On appeal to this court the judgment was sustained. *Channon v. Lusk.* 211

7. The decision of a referee will not be reversed on appeal, upon the ground that it is given against a preponderance of testimony as respects the number of witnesses,

where the evidence is conflicting, and no fact clearly ascertained, controls the case. *Dauchy v. Silliman.* 361

See ACT OF BANKRUPTCY, 2.
EXECUTORS AND ADMINISTRATORS, 7.
GENERAL TERM.
SURROGATE, 2.
PRACTICE, 6, 11, 12, 14, 18.

ARSON.

1. On the trial of an indictment under § 4, 2 R. S., 667, for setting fire in the night to a certain building, the property of an incorporated company, "erected for the manufacturing of woolen goods," it is proper to prove by the president of the company that the building fired was intended as a manufactory for such goods, though it was not at the time completed and used as such. *McGarry v. The People.* 227

2. And if the building was erected for such a manufactory, though not yet in fact appropriated to that purpose, there may be a conviction. *Id.*

3. Whether the erection has progressed sufficiently to constitute a building within the statute, is, it seems, a proper question for the jury. *Id.*

4. It seems that the statute distinguishes buildings of the latter class from those elsewhere mentioned in the section. *Id.*

5. A structure raised, roofed, inclosed on two sides, with its floors partly laid and window frames in without sashes.—*Held*, to be a building "erected" within the intent of the statute. *Id.*

ASSESSMENT.

1. A horse railway, constructed along and upon the grade of a highway, by laying rails of the ordinary dimensions upon pine stringers, fas-

tened together with similar ties, together with the right (acquired partly by grant from adjoining owners, and partly by proceedings under the general railroad law), qualified by the public easement, to maintain and operate the road thereon, owned by a company chartered for fifty years, is assessable as real estate. *People v. Cassidy*. 294

ASSESSMENT FOR HIGHWAY LABOR.

See HIGHWAY, 1 TO 9.

ASSIGNEE OF MORTGAGE.

See GUARDIAN AND WARD, 3.

ASSIGNMENT.

See BANKER AND BANK DEPOSITORS, 1.
POWER AND AUTHORITY, 4, 5.

ASSIGNMENT OF MORTGAGE.

1. The assignment, of a mortgage given without bond, or other extrinsic written evidence of the debt secured, and containing no express covenant to pay, transfers to the assignee all the mortgagee's claim under the mortgage, viz.: His remedy against the land. *Severance v. Griffith*. 38
2. A complaint for foreclosure, set forth such a mortgage, expressed as security for payment of a sum of money in installments, and averred that it had been given to secure a part of the price of the mortgaged premises, and assigned to plaintiff. — *Held*, on demurrer, to show plaintiff to be owner of the mortgage debt. *Id.*
3. An assignment of a bond and mortgage, and "the moneys due and to grow due thereon," carries by its terms a note for which they are held as collateral. *Belden v. Meeker*. 471

4. The debtor upon a security for a sum exceeding \$1,000, may not impeach a transfer thereof on the ground that it was made for a moneyed corporation (1 R. S., 591, § 8), by its president, without authority by previous resolution of the board of directors. *Id.*

5. Nor can he avail himself of an objection that such transfer was made by the president to pay an individual debt, and without consideration passing to the corporation. *Id.*

6. And, it seems, without proof to the contrary, due authority to the president will be presumed in favor of the transfer. *Id.*

See ACT OF BANKRUPTCY, 1.
RECORDING ACTS.

ATTACHMENT.

See APPEAL, 4.
NON-IMPRISONMENT ACT 1, 2, 3.
SURROGATE, 1.

ATTORNEY-GENERAL.

1. The attorney-general has the power belonging to that officer at common law, and such additional powers as the legislature has conferred upon him. Per MULLIX, J. *The People v. Miner*. 396
2. But the only cases in which at common law he was authorized to interfere to restrain corporate action, or was a necessary party to an action for that purpose, were those in which the act complained of, would produce a public nuisance or tend to the breach of a trust for charitable uses. *Id.*
3. The case of *Davis v. The Mayor, &c., of New York* (3 Duer, 663), commented on and explained, and certain dicta in that and in other cases disapproved, and the cases therein cited, examined. *Id.*

See PRACTICE, 8.

BAILMENT.

See **BANKER AND BANK DEPOSITORS, 2.**

BANKER AND BANK DEPOSITORS.

1. A banker in business on his own account, but insolvent, and intending an immediate general assignment, unless assisted during the day, receives a sum of money for deposit from one of his depositors who is ignorant of the insolvency, and he makes an entry thereof in the depositor's bank book, but keeps the money in a separate parcel labeled with the depositor's name, intending to redeliver it if he shall assign; he makes no entry in his own books except a memorandum in his cash book, beneath which he writes the depositor's name; and afterward, on the same day, he assigns his property generally for the benefit of his creditors, and delivers the parcel to the assignee with a request that he will, if he may legally, give it to the depositor.—*Held*, that the assignee took no title to the deposit. *Chaffee v. Fort.* 81
2. The delivery of the parcel to the assignee, addressed to the depositor for delivery to him, was in effect a delivery to the latter, and after a demand of the amount the assignee was merely his bailee. *Id.*

BANKRUPTCY.

See **ACT OF BANKRUPTCY. INSOLVENT DEBTORS.**

BEQUEST.

See **DEVISE AND BEQUEST.**

BILL OF LADING.

On receipt of goods at New York destined to Chicago, but consigned to an intermediate consignee at

Buffalo, the carrier signed two bills of lading; one of them he retained, and it required delivery at Buffalo, named the charge for freight to that place, and directed the consignee to pay the shipper or his order, specified advances made by him to the carrier; the other was identical with it, except in containing an additional memorandum of the charge for freight from New York to Chicago, and further consigning the goods to a Chicago consignee, and was sent by the shipper to the Buffalo consignee. The carrier delivered the goods to the consignee at Buffalo.—*Held*, that the latter became liable for the freight money earned on acceptance of the goods, and that the carrier could recover the same of him. *Dart v. Ensign.* 383

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. In an action upon a promissory note, brought by one who has taken it for value, but after maturity, the maker may defend, upon the ground that the note was given, solely as protection against a mortgage executed and delivered to him by the payee to prevent a collection out of the mortgaged property of penalties incurred by the violation of law. *Merrick v. Butler.* 103
2. It is also a sufficient defence to the suit if while the note was in the hands of the payee, the maker, without consideration, acknowledged satisfaction of the mortgage. *Id.*
3. The payee and holder of an overdue promissory note, given for money loaned by him to the maker, purchased personal property from the latter and surrendered the note as the consideration for the sale.—*Held*, that he was a *bona fide* purchaser, as against a prior mortgagee of the vendee, of whose mortgage he had no actual or constructive notice. *Powers v. Freeman.* 127
4. The decision in *Day v. Saunders* (3 Keyes, 347), commented upon and

explained, and held to be decisive in this case. *Id.*

- * The defendant's testator, while living, delivered to the plaintiff, his sister, a sealed envelope, indorsed with directions not to open it until after his death, and to return it to him on request; this was upon his recovery from a dangerous illness, happening upon a visit at the plaintiff's house during which he had received from her extreme care and attention, and frequently told her that he would pay her well; the envelope was once returned to the testator at his request upon a subsequent visit, and redelivered to the plaintiff some two hours afterward. After the testator's decease, the plaintiff being previously ignorant of its contents, the envelope was found to contain his note to her, for \$10,000, expressing the consideration to be for services rendered to him. — *Held*, that the plaintiff was entitled to recover the whole amount of the note. *North v. Case.* 264
6. A promissory note, payable to order, was indorsed before maturity, to a holder for value and without notice of any defence, by one assuming to act for the payee, but having no authority to make the indorsement; after commencement of an action thereon by the indorsee the payee ratified the indorsement. — *Held*, that the note was open to defences, existing between the original parties thereto. *Gilbert v. Sharp.* 412
7. And, it seems, that a ratification before suit, if made after maturity, would not relate back so as to cut off a defence on the merits. *Id.*
8. In an action upon a negotiable promissory note, brought by a purchaser thereof before maturity, in good faith and for a valuable consideration, against the maker, the latter may prove as a defence that when he signed it, it was represented to him, and he believed it, to be a contract entirely different in character. *Whitney v. Snyder.* 477
9. The case distinguished from that of a note fraudulently obtained,

and which the maker intended to make. *Id.*

See EVIDENCE, 6.
JOINT AND SEVERAL DEBTORS
PREMIUM NOTE.

BONA FIDE HOLDER.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, 1, 3, 6, 8, 9.

BOND.

See POWER AND AUTHORITY, 1 TO 6.

BOUNTY BROKERAGE.

See CONSPIRACY.

BUILDING.

See ARSON, 2, 3, 4, 5.

CANAL APPRAISERS.

The return to a writ of certiorari brought from the determination of the canal appraisers under sections 16 and 17, of chapter 288, Laws 1840, presented no question of jurisdiction or of law as having been raised before, or decided by the appraisers. — *Held*, that their determination should be affirmed. *People v. Carrington.* 368

The act contemplates the review of legal or constitutional questions only. Per INGALLS, J. *Id.*

CANAL LOCK.

See NEGLIGENCE.

CANAL REPAIRS.

See NEGLIGENCE.

CARRIER.

See COMMON CARRIER.

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3, 4.

See OWNERSHIP IN COMMON OF
CHATELS.

**COMMENCEMENT OF AN AC-
TION.**

See PRACTICE, 7

COMMITMENT.

See SURROGATE, 1.

COMMON CARRIERS.

1. The defendant, who owned and kept for the convenience of his business as a manufacturer of staves, a canal boat, suitably manned and equipped, received from the plaintiffs, who were common carriers, a cargo of the merchandise of their shippers indifferently, and undertook its transportation on such boat to a point on their route of business, for the usual rates of charge, to be collected and paid over by the plaintiffs, less a commission retained.—*Held*, that he was not liable to the plaintiffs as a common carrier, although he had applied for the cargo, knowing the general ownership it must have, and a year previously had made with them and performed a similar contract. *Fish v. Clark* 176
2. The New York Central Railroad Company received goods from the plaintiff, directed to a certain place on the Michigan Southern railroad, and, under a special agreement limiting its liability to its own route, carried them to Suspension Bridge, upon such route, and then delivered them to the defendant. The defendant's road, extending from Suspension Bridge, N. Y., to Windsor, Canada, connected with that of the Michigan Southern Railroad Company, by ferry from Windsor, at Detroit, where under a contract between the two companies, for the purpose, the defendant was accustomed to deliver freight arriving by its line, to the Michigan Southern Company, for transporta

- tion to points on the road of the latter, which collected the entire freight charges on the final delivery, and periodically accounted for the portion thereof, due to the defendant. The defendant received the goods in question for transportation without limiting its general duties as a common carrier.—*Held*, that it impliedly undertook for the carriage thereof to their place of destination, and was liable therefor as a common carrier after it had delivered them to the Michigan Southern Company, at Detroit. *Root v. G. W. Railway Co.* 199
3. The case distinguished from *Van Santvoord v. St. John* (6 Hill, 157), by reason of the contract between the carriers and their custom under it. *Id.*
 4. If doubt existed as to such liability of the defendant at common law, its liability under the statute of 1847 (chap. 270, § 9), was undeniable. *Id.*
 5. The defendant having made the contract for transportation at the terminus of its route within the State, it was liable under the provisions of the act although a foreign corporation. *Id.*
 6. And this was so, although the Michigan Southern Company was a foreign corporation also, and not liable over to the defendant, under the act. *Id.*
 7. It seems, that the statute in question is not limited to domestic corporations only. *Id.*
 8. Nor was the defendant's liability under it, for the plaintiff's goods while in charge of the Michigan Southern Company, limited to the case of loss by reason of the latter's "neglect or misconduct." *Id.*
 9. Nor is the statute in question simply declaratory of the common law; it created a new rule of liability in respect to connecting railroad corporations. *Id.*
 10. Nor was it material upon the question of the liability that the New York Central Company, and not the defendant, originally received the goods.
 11. By the act in question, each successive railroad company forming a link in the chain of communication between the place of freighting and the place of destination, which agrees to convey property beyond the terminus of its own road, and receives the goods under such an agreement, is liable, as a common carrier, for the delinquencies of each of the other roads, running in connection with it, over which the property shall subsequently pass, on the route to the place of delivery. *Smith v. N. Y. C. R. R. Co.* (43 Barb., 225), upon the latter point explained. *Id.*
 12. The defendants as common carriers, received merchandise for transportation from the plaintiff, addressed to a consignee at W., which they carried to C., the terminus of their route, and delivered to an irresponsible warehouseman, a common agent in that respect, for several other carriers, and for themselves; from the premises of the warehouseman it was taken by a teamster, such being ordinarily the means of transportation between C. and W., and left, in the absence of the consignee, on his premises, with notice to, and in the presence of a member of his family; the consignee afterward refused to receive it, and notified the teamster thereof, who returned it to the warehouse of C., without notice of any kind to the warehouseman, where it was lost, and the plaintiff brought a suit to recover its value.—*Held*, that he was properly nonsuited. *Salinger v. Simmons.* 325
 13. There was a delivery to the consignee, and thereupon if not before the defendant's contract was performed, and they could not therefore be held liable for previous negligence in delivering at C. to an irresponsible warehouseman; nor could the return of the merchandise to the defendant's agent, without notice as to which of his principals it was intended for, revive their liability. *Id.*

14. Where common carriers by water, under false and fraudulent representations, as to the character of their vessel, made a special contract, to carry goods at the shipper's risk, he insuring at the carrier's expense; and the shipper failing to effect an insurance, because the vessel was not as represented, prohibited the carriers before the voyage began, from taking the goods, and they persisting, the goods were damaged on account of a collision on the way.—*Held*, that the shipper might treat the carriers as if they had undertaken to transport the goods without limitation of their liability, and sue, and recover from them, upon that theory. *Dauchy v. Silliman*. 361

15. The defendants, as trustees for the mortgage bondholders of a railroad company, obtained a decree of foreclosure and sale under the mortgage, by which they were authorized in default of bidders to purchase the mortgaged property as trustees, also to operate the railroad and receive the income thereof, until a sale or transfer. Having purchased under the decree, and operated the road as thereby provided until a transfer to a company newly organized.—*Held*, that they were liable as common carriers for goods, received by them as such, while operating the road as trustees. *Rogers v. Wheeler*. 486

16. *Held* further, that the defendants were not in possession of the property as receivers thereof, and were not relieved from liability as standing in such relation to the court, their accountability being not to the court, but to the bondholders. *Id.*

17. And it seems that without the provisions of the decree authorizing them, it was the duty of the defendants to bid in the property if necessary to protect the interests of their *cestuis que trust*. *Id.*

18. *Held* further, the defendants having surrendered, conveyed and delivered the whole property purchased, to a company newly organized, in obedience to a decree

of the court, which provided for full indemnity to them by lien upon the property, as "against all liability of every description, incurred or to arise out of, any act or contract done, or made, or omitted to be done, by them as such trustees," and having in the deed reserved such lien, that the transfer did not affect their liability for goods received by them as common carriers before the same took place. *Id.*

See DELIVERY.

CONSIDERATION.

A promise by the defendant to pay a certain sum in settlement of a dispute respecting the plaintiff's claim.—*Held*, to be supported by a good consideration. *Scott v. Warner*. 49

See BILLS OF EXCHANGE AND PROMISSORY NOTES, 3, 5.
POWER AND AUTHORITY, 2.

CONSIGNOR AND CONSIGNEE

See BILL OF LADING.
DEMURAGE.

CONSPIRACY.

In June, 1864, four persons, anticipating a government call for troops, agreed to divide the profits and share the losses of any contracts made by them individually or collectively, for furnishing the quota of recruits of one or more towns of a certain county, for a sum not less than \$500 per man, and that they or either of them, should make no agreement to furnish the quota of any town for a less sum than \$500 per man, without the assent of all.—*Held*, that the agreement was designed to restrain competition in procuring enlistments, and tended to increase the burdens of taxation and was void as against public policy, and that every part of the

contract into which it had been incorporated was also void. *Marsh v. Russell.* 840

CONTEMPT.

Where an injunction issued, and was served on the defendant, in an action against the president of an association, and purported to restrain him "as president" of the association, "its officers and members."—*Held*, that the associates to whom the service was made known and the summons, complaint and order were read at a meeting of the association, by its officers acting thereat, were amenable for contempt in taking proceedings contrary to the prohibitions of the injunction. *Borke v. Russell.* 242

See SURETY, 1.

CONTINUING GUARANTY.

See MORTGAGE OF LAND, 1, 2.

CONTRACT.

1. An agreement to sell certain growing hops at so much per pound, and that they should be of first quality, held to intend harvesting and preparing the same for delivery as hops are usually prepared for marketing by weight. *Warren v. Winne.* 209
2. An agreement of December 28th, 1868, to sell real estate for a certain sum, and to take in payment therefor, in part a lease of restaurant premises, and in part merchantable wines at the market price, to be delivered at intervals from such time as the vendor should commence the restaurant business, and for one year thereafter, as they should be required, not to exceed in value, \$250 at any one time; and, "on receiving such payments at the time and in the manner above mentioned," to deliver a deed, "which deed shall be delivered on the 31st day of De-

cember, 1868.—*Held*, not to be specifically enforceable in equity, as uncertain and impossible of execution. *Mehl v. Von Der Wulbeka.* 267

See ACCIDENT INSURANCE.
BILLS OF EXCHANGE AND PROMISSORY NOTES, 5.
CONSIDERATION, 1.
COMMON CARRIER.
CROPS.
MISTAKE OF FACT.
PRINCIPAL AND AGENT, 1.
POWER AND AUTHORITY, 3.
STATUTE OF FRAUDS, 1, 2.
VENDOR AND PURCHASER OF LAND, 1, 2, 3.

CONVERSION OF PERSONAL PROPERTY.

See OWNERSHIP IN COMMON OF CHATTELS AND VENDOR AND PURCHASER OF LANDS, 3.

CORPORATION.

1. The act of 1849 (page 889, chapter 258), providing for the prosecution of actions by or against "any joint stock company or association, consisting of seven or more shareholders or associates," in the name of its president, &c., did not, it seems, until extended by the act of 1851 (page 888, chapter 455), apply to associations wherein the members were not shareholders or stockholders. *Kingsland v. Braisted.* 17
2. The members liable, as such, of any "association composed of not less than seven persons, who are owners of, or have an interest in any property, right of action or demand, jointly or in common, or who may be liable to any action on account of such ownership or interest," are now, under the provisions of the act of 1849, liable in a suit upon an indebtedness of such association, after judgment against it, and execution returned unsatisfied thereon. *Id.*

3. The statute preserved, but did not extend the right to enforce against such members a liability, as partners, which existed independently of it. *Id.*

4. In an action against the associates, after judgment and execution, returned *nulla bona* against the association (see Laws 1853, page 285), the plaintiff is not entitled to recover costs of the original suit. *Id.*

5. The acts of 1849 (page 389, chapter 258), and 1851 (page 838, chapter 455), in relation to suits against joint stock companies and associations, were intended to apply to suits having in view a remedy against the "joint property and effects" of such companies and associations. *Rorke v. Russell.* 244

6. When, therefore, an action merely seeks to restrain an unincorporated association by injunction, from carrying into effect its resolution of suspension against one of the members of the association, it is not within the meaning of said acts and is not well brought against the president of the association merely. (INGRAHAM, J., dissenting.) *Id.*

See ASSESSMENT.

ATTORNEY-GENERAL, 1, 2, 3.

CONTEMPT.

INDICTMENT, 3.

PRACTICE, 1, 2, 3.

COSTS.

1. When the issues in an action of foreclosure are referred, the referee is charged with the duty of making a decision on the question of costs. *Stevens v. Verians.* 90

See CORPORATION, 4.

EXECUTORS AND ADMINISTRATORS, 8 TO 13.

PAUPER.

COUNTY COURT.

See APPEAL, 4, 5, 6.

INSOLVENT DEBTOR, 1, 3.

COUNTY POOR.

See PAUPER, 4.

COURT OF A JUSTICE OF THE PEACE.

See APPEAL, 3, 4, 5.

NON-IMPRISONMENT ACT, 1 TO 4.

COVENANT.

See EASEMENT, 3.

CREDITORS.

See PRACTICE, 1 3.

CRIMINAL LAW.

See ARSON.

EVIDENCE, 7, 8.

INDICTMENT.

JURY AND JURY TRIAL.

CROPS.

An agreement for the cultivation of a farm on shares, dated March, 1866, provided that the defendant's assignors should "have one-third of all crops grown upon the above mentioned farm for one year;" with no other specification respecting the term.—*Held*, such construction, according with the apparent intention of the parties to the agreement as indicated by their subsequent acts, that the defendant was entitled to a third of wheat sown by him in the fall of 1866, which matured in the summer of 1867. *Armstrong v. Bicknell.* 216

See MONEY HAD AND RECEIVED.

CROSS-EXAMINATION.

See WITNESS, 4, 5, 6.

DAMAGES.

See EVIDENCE, 1, 2.
STATUTE OF FRAUDS, 1, 2.

DEED.

1. In 1849, the owners of certain agricultural lands built an embankment thereon as a highway, and also to dam a stream running through the premises, and thereby create a reservoir to supply water by means of a culvert under the embankment, to a mill further down the course of the stream, occupied under them by one B. In March, 1850, the owners conveyed to B. the mill premises, with the privilege of using "the reservoir dam," and, in June of the same year, contracted with him to sell and convey, with possession until conveyance, other premises lying along the bank between the mill site and the down stream side of the culvert. B. took possession of, and, in 1852, built a new mill on the premises described in the contract, which he operated with the said owner's knowledge by water supplied from the reservoir through the culvert by means of wooden flume therefrom, and soon after abandoned the use of the old mill. In 1853, while the new mill was so in operation, the said owners conveyed the premises described in their contract with B., together "with the appurtenances," to his assignee, with covenants of warranty, and, in 1867, they conveyed the land covered by the reservoir to the defendant C.—*Held*, that a right to use the waters from the reservoir passed by the grant to B.'s assignee, and C. was perpetually restrained, in a suit against him and the commissioners of highways, brought by one having title through such assignee, from destroying the reservoir, or diminishing the supply of water, or interfering with its flow upon the plaintiff's premises. *Simmons v. Cloonan*. 846

2. Nor can C. claim on appeal in such suit, authority from the com-

missioners of highways to interfere with the plaintiffs' rights in the reservoir, he having interposed as a defence a personal right, no separate motion having been made for nonsuit, etc., at the trial on behalf of the commissioners, and no evidence having been given of steps taken by the commissioners, as such, respecting such interference. *Id*.

See DEFENCES, 2, 3, 4.
EASEMENT, 1, 2, 3.
MORTGAGE OF LAND, 5.

DEFENCES.

1. In an action of trespass, for entering and cutting standing timber, the defendant may interpose, as a defence, a right as the equitable owner of the timber. *Carpenter v. Otteley*. 451
2. A deed of timbered land, with covenants against the grantor's acts, was made and delivered to the plaintiff, who paid for the land only, and promised, without writing, to convey the timber with the right to enter and cut the same to one with whom the grantor had an unwritten contract for its sale, and who afterward paid the latter for the same.—*Held*, that the grantor's vendee of the timber was the equitable owner thereof, and not liable to the plaintiff, who had refused performance of the unwritten promise, for entering under such promise and cutting the timber. *Id*.
3. The plaintiff having acted by an agent, in negotiating the purchase and in taking the conveyance.—*Held*, that the arrangements made by such agent, upon delivery of the deed and after the contract of sale for the taking of the timber, were adopted by the plaintiff on acceptance of the deed, and became part of the *res gestæ*. *Id*.
4. *Held*, further, that evidence of the agreement in respect to reservation of the timber, and for its conveyance by the plaintiff, did not tend to vary or contradict the covenants of the deed.

And that the plaintiff was estopped from setting up the statute of frauds. *Id.*

See ASSIGNMENT OF MORTGAGE, 4, 5, 6.

BILLS OF EXCHANGE, &c., 8, 9.

POLICY OF INSURANCE, 1.

DELIVERY.

1. The owner of a trunk sent it to the defendant's railroad depot by an expressman, who placed it within the depot, beside the baggage crate, which was locked, and, upon inquiring of persons there, engaged in handling freight, was referred to the ticket agent as the person who took charge of the baggage; he went to the ticket agent's office, and told him that there was a trunk outside; the agent said that it was right, and immediately sent two men to take care of it. When the owner inquired for the trunk on purchasing his ticket later in the day, it could not be found, though the ticket agent said that he had seen one a short time before answering to its description. Employees of the defendant also said that it had been delivered upon the presentation of a check. In an action to recover the value of the trunk and its contents. — *Held*, that there was sufficient evidence of delivery, and a nonsuit was wrong. *Rogers v. Long Island R. R. Co.* 269

2. *Grosvenor v. The N. Y. Central R. R. Co.* (39 N. Y., 34), distinguished. *Id.*

See BILLS OF EXCHANGE AND PROMISSORY NOTES, 5.

DEMURRAGE.

An intermediate consignee, having no interest or ownership in the property, held not to be liable for demurrage on account of unreasonable delay in unloading at Buffalo. *Dart v. Ensign.* 883

DEVISE AND BEQUEST.

1. Testator gave his homestead farm, and all his personal estate, mainly household furniture, farming implements and stock on the farm, *durante viduitate*, and in lieu of dower, to his widow, for her maintenance, and as means in her hands, or under her control, for bringing up, educating, etc., his four minor children, who were to remain with the widow at her dwelling on the farm, and beyond the value of their services, at her expense, which she was to defray out of his estate or its income; the farm to remain unsold and undivided during the widow's estate, she, with the advice and assistance of the executors, to control and manage his estate for her own and the children's benefit, and for the purposes intended by the will, and, as fast as consistent therewith, to advance to the minors, at the age of twenty-one, such portions of the estate given them respectively as, with the executors, she might deem practicable and reasonable. There was a limitation over, after the widow's estate, to the testator's five children, who were then given the residuary real and personal estate. The testator's children were all twenty-one at the time of his decease. — *Held*, that the executors were not entitled to convert the personal property into permanent securities, and pay the income thereof to the widow; but that it passed to her *in specie*, and in trust, for the purposes specified in the will. *Hill v. Hill.* 48

2. Where the testator, by his will, devised a certain lot of ground to his widow, "for her sole and absolute disposal," and immediately after gave her all other real and personal estate of which he should die possessed, "for her own personal and independent use and maintenance, with full power to sell, or otherwise dispose of the same, in part or in the whole, if she should require it or deem it expedient so to do," and then authorized his executors to pay the residue of his real and personal estate to the trustees of a certain society. — *Held*, that the widow

took an estate for life in the real estate secondly devised, with a general power of disposition, and that, upon her decease, without executing the power, said real estate passed to the second devisee. *Terry v. Wiggins.* 272

3. And it seems that this is so at common law as well as under the Revised Statutes. *Id.*

DECISION BY JUDGE.

See PRACTICE, 13 to 16, 19, 21, 22.

DISCHARGE OF LIABILITY.

See BILLS OF EXCHANGE, &c.
PROMISSORY NOTES.

EASEMENT.

1. The grant of a right to conduct water, by means of pipes laid beneath the surface of land, from a spring thereon, is a grant of an easement, and not of any part of the land itself. *McMullin v. Wooley.* 394
2. The existence and user of such an easement, by the grantee thereof, constitutes no breach of a covenant for quiet enjoyment, or of warranty in a subsequent deed by his grantor. *Id.*
3. It seems that to protect himself against an easement upon land, the purchaser must take a covenant against incumbrances. *Id.*

EJECTMENT.

Upon recovery in an action for possession of land, interest on the value of each annual rent, which might have been obtained for the land, is allowable by way of damages. *Low v. Purdy.* 422

ELECTION OF ACTIONS.

1. Judgment against M. as maker, G. as first and T. as second indorser of a promissory note, was enforced by execution sale of G.'s land, at which T. was the purchaser for the amount due upon the judgment, he having become the assignee thereof, and expenses. T. agreed to give G. three years to redeem, and, persuading M. that nothing had been realized toward satisfying the judgment, agreed with him to satisfy it on receiving certain payments, in the aggregate considerably less than the amount due thereon, and also assigned his certificate of sale to G. on payment by the latter of a sum in full of, and nearly equal to, the amount of his bid. T. satisfied the judgment as against all of the defendants therein on payment by M. as agreed; and when G. learned of the transaction he sued T. and recovered judgment for the amount paid on assignment of the certificate; but T. being deceased, his estate paid only part of the judgment.—*Held*, that G. had an election upon discovery of the satisfaction given to M. either to ratify it and claim to recover from T. the amount which he had paid to the latter, or to ratify the execution sale, and recover from M. as principal debtor, upon the theory that he (G.) had paid the judgment; but that having elected to pursue the former remedy, he could not recover afterward from M. the balance of his judgment against T. *Goss v. Mather.* 283
2. After six months are elapsed from the delivery of possession of demised premises, under an execution upon a judgment in ejectment in favor of the landlord, the tenant's right of redemption under the statute (2 R. S., 506, § 33), cannot be revived by the issuing of a new writ upon the judgment made necessary by his unlawfully re-entering upon the premises. *Van Rensselaer v. Wilbeck.* 498
3. And it seems that the tenant cannot enlarge the time allowed him for redemption under the statute (*id.*), by wrongfully retaking possession before the original execu-

tion run out, and thus rendering its execution incomplete *Id.*

4. The provisions of the article of the Revised Statutes, entitled "Of the recovery of possession of demised premises for non-payment of rent, by ejectment," are applicable to the so-called manor leases. *Id.*

5. Nor is the relief upon judgment in ejectment upon such leases, limited at common law to a right to hold possession of the land for time sufficient to satisfy the rent in arrear, costs, etc. *Id.*

See DEED, 1, 2.

VENDOR AND PURCHASER OF CHATTLE, 3, 4, 5.

EQUITABLE OWNERSHIP.

See DEFENCES, 1, 2.

ESTATE FOR LIFE.

See DEVISE AND BEQUEST, 1, 2, 3.

EXECUTORS AND ADMINISTRATORS, 6.

ESTOPPEL.

See DEED, 2.

DEFENCES, 4.

HIGHWAY, 6.

VENDOR AND PURCHASER OF CHATTELS, 1.

EVIDENCE.

1. The measure of damages being the difference between the actual value and value if as represented of the cheese, on a sale thereof under fraudulent and false representation, as to its quality, and the sale having been made with reference to the market at New York, and the value at that place, in fact, and the value which it would have had there, if as represented being shown, evidence of the amount actually realized by sale of the

cheese in England was held inadmissible to reduce the defendant's damages *Durst v. Burton.* 137

2. Nor were the defendants entitled to show that the market price for cheese at New York was controlled by the market of London, in connection with proof that through sales at London in the ordinary course of business, the plaintiff netted a larger sum for the cheese than the actual market value thereof in New York, and especially, where the evidence did not relate to the time in question. *Id.*

3. The plaintiff in an action to recover for his services under an agreement, to remunerate and board him in consideration thereof, may show the value of his services with or over and above board, by the testimony of a witness who has had no knowledge of the value of the board furnished. *Stevens v. Benton.* 156

4. He may not show the compensation paid him for like services by a former employer in whose service he had been, directly before the services in question, and who had taken him into employment after a prior engagement with the defendant. *Id.*

5. In an action brought to set aside the deed of a deceased grantor, as fraudulent against his creditors, with a view to a subsequent application to the surrogate for sale thereof under section 72, chap. 460, Laws of 1837, which, as amended in 1843 (chap. 172), renders a judgment upon the merits against administrators, etc., *prima facie* evidence of indebtedness upon the application.—*Held*, that the plaintiff did not sustain his complaint by simply showing a judgment in his favor against the grantor's administrator. *Sharp v. Freeman.* 171

6. Where a promissory note is found in the maker's hands, canceled, his indebtedness thereon is presumptively discharged, and proof that no payment has been made, nor offset surrendered in respect thereof, does not destroy the presumption *Gray v. Gray.* 171

7. A prisoner sworn as a witness upon his own trial, under chap. 678 of the Laws of 1869, waives the constitutional protection (art 1, § 6) by which no one may be "compelled in any criminal case to be a witness against himself," and may be examined upon any matter pertinent to the issue. *McGarry v. The People.* 227
8. Chapter 3, of the Laws of 1848, providing for the punishment of seduction under promise of marriage, enacts that "no conviction shall be had under the provisions of this act on the testimony of the female seduced, unsupported by other evidence." Where, on the trial of an indictment under this act the prosecutrix testifies to the promise, intercourse, and other facts, essential to constitute the offence, and other testimony tending to support her upon such points is given, whether or not she is sufficiently supported to justify a conviction is a question for the jury. *Crandall v. The People.* 309
9. The plaintiff suspended a scaffold, in front of a house upon which he was employed as a painter, by fastening one of the ropes attached thereto to the chimney of the defendant's adjoining house, without the latter's permission; as he stepped upon it, on returning to his work, the rope untied from the chimney and he received injuries by the fall of the scaffold, for which he sued the defendant. Upon the trial it appeared that the defendant, having been informed that the rope was fastened to, and that it endangered, his chimney, was afterward, on the day preceding the accident, seen upon his roof handling the rope; that afterward, when charged with causing the accident he did not deny it, but offered to pay for medical attendance to the plaintiff, if not excessive in amount. At the close of the plaintiff's testimony the court refused a nonsuit; but after the defendant had given evidence contradicting that of the plaintiff, and tending to show that it was manifestly untrue, and had himself sworn that he did not touch the rope, or know what was suspended to it, on renewal of a motion therefor, it was granted.—*Held*, that the evidence should have gone to the jury, and the nonsuit was wrong. *Phillips v. Wilpers.* 889
10. *Held*, further, that the defendant was not justified by the plaintiff's trespass, in recklessly unloosening the rope; and that it was for the jury to say whether he did unloosen it, and if so, whether he exercised proper care in ascertaining what was fastened to it. *Id.*
11. To maintain his action as administrator, the plaintiff proved letters of administration in which his intestate's decease, and residence immediately prior thereto in the county of the surrogate from whom the letters issued, were recited.—*Held*, that there was *prima facie* evidence of the facts so recited. *Belden v. Meeker.* 470
12. Proof that the intestate did business and had an office in the county, is, it seems, presumptive evidence that he resided there at his decease. *Id.*
- See ASSIGNMENT OF MORTGAGE, 4 TO 6.
 APPEAL, 7.
 ARSON, 1.
 DEFENCES, 3, 4.
 EXECUTORS AND ADMINISTRATORS, 3.
 JURY AND JURY TRIAL.
 MONEY HAD AND RECEIVED, 2.
 PLEADINGS, 8.
 POLICY OF INSURANCE, 1, 2.
 SURROGATE AND SURROGATES ORDER.
 WITNESS, 1 to 7.
- EXCEPTIONS.
- . See PRACTICE, 6 TO 13.
- EXCISE.
- County commissioners of excise holding office under the law of April 10, 1857, sued to recover penalties

as therein provided; after suit the "act regulating the sale of intoxicating liquors" of April 11, 1870, was passed and the defendant pleaded it as a defence. On demurrer to the answer it was held that the plaintiffs were authorized to prosecute the action notwithstanding the latter law. *Board of Commissioners of Excise v. Willey.* 427

The act of 1870 did not altogether abolish the county boards of commissioners of excise then existing. (Per MARVIN, J.) *Id.*

It deprived them of the power to grant licenses, but not to sue for the penalties not inconsistent with such act, which are provided for by the act of 1857. *Id.*

Various provisions of the acts of 1857 and 1870, compared and commented on. *Id.*

See NOTE UNDER ERRATA.

EXECUTION.

See JUDGMENTS AND EXECUTIONS.

EXECUTORS AND ADMINISTRATORS.

1. Executors directed by the testator to invest in United States government stocks, State, city or town securities, or upon bonds and mortgages, whatever funds they might from time to time have in hand, awaiting the period for disbursement according to the provisions of the will, invested small sums, but retained in hand large average balances for several years, holding them on deposit to their individual credit, and in their names as executors, and in different banks, shifting the deposits from one bank to another, and in part, using the same for accommodation of one or more of their number.—*Held*, that they were chargeable with interest on the balances, after allowance of reasonable time for investment, and were not excused from its payment, because of objection by some

of the distributees to investments in United States securities, or of difficulty in obtaining investment in bond and mortgage, or of any right to keep the moneys in readiness to pay over to the parties entitled, pending proceedings for distribution, and notwithstanding the legatees, etc., had not informed the executors of any opportunity to invest in proper securities. And they were charged interest at six per cent, on the sums held by them at the end of every half year, after allowing thirty days to make investment. *Gilman v. Gilman.* 1

2. It not appearing that the executors had derived any personal benefit from the funds of the estate other than that which might have arisen incidentally to their credit from moneys deposited in bank, and they having credited the estate with interest on all moneys used by them.—*Held*, that they were not chargeable with compound interest. *Id.*

3. Evidence being given that testator had agreed with M., one of his executors, to support him if he would attend to his (testator's business), and of testator's saying he had promised M. to pay him sufficient for his own and family expenses, and of his expressing himself a short time before death, as satisfied with M.'s attention to the business.—*Held*, that M.'s claim for compensation was properly allowed as a payment to him by the executors. *Id.*

4. But the executors were not entitled to charge the estate with the expenses of their unsuccessful resistance to an application for an order requiring them to account, nor of their defence in proceedings for contempt for neglecting to account. *Id.*

5. A note of one of the executors given testator in his lifetime, having been charged to him in their account.—*Held*, that the charge was proper, notwithstanding judgment had been recovered on the note in Maine.

6. An executor who has paid the principal of a trust fund to a lega-

tee entitled to an annual payment of its income only, though not allowed on his accounting to credit himself with the payment as a payment of principal, cannot, it seems, be required to pay over again interest upon such principal. *Saltus v. Saltus*. 9

7. But on appeal from a surrogate's order, directing the investment, with interest, of money so paid, if the petition of appeal specify as the sole ground of appeal, error in a certain other recited portion of the order, the error will be disregarded, and the order, if otherwise proper, affirmed. *Id.*

8. Costs are not taxable against executors or administrators, as of course, where judgment is recovered against them as defendants in an action. *Howe v. Lloyd*. 335

9. It seems, they are only granted in such case, pursuant to section 41 (2 R. S., 90), by order upon motion. *Id.*

10. The plaintiff, on a referee's report, in his favor, in an action against the defendant as executrix, entered judgment for damages and costs; the defendant appealed from the entire judgment, and then the plaintiff readjusted the costs upon notice, and the defendant moved, at Special Term, and obtained an order setting aside the judgment as irregular; on appeal from the order, the court directed the costs to be stricken from the judgment, without prejudice to a motion by the plaintiff for costs, and the judgment was otherwise allowed to stand without costs. *Id.*

11. The entry of judgment for costs in such a case, is not an irregularity waivable by an appeal. *Id.*

12. And it seems the appeal, being prior to the adjustment, could have no effect as a waiver upon the proceedings therefor. Nor would the court consider, upon the appeal from the order, the plaintiff's right to have costs under the statute. *Id.*

See DEVISE AND BEQUEST, 1, 2.

See EVIDENCE, 11, 12.

SURROGATE AND SURROGATE'S ORDER.

EXEMPTION OF SOLDIER'S PAY AND BOUNTY.

1. The exemption of a soldier's pay and bounty from levy or sale under an execution (Laws 1864, chap. 578, page 1332), does not extend to property purchased with or otherwise voluntarily obtained in exchange for the same. *Wygant v. Smith*. 185

2. The principle and extent of such exemptions explained. (Per JOHNSON, J.) *Id.*

EXPERT.

See WITNESS, 1, 2, 3.

FALSE PRETENCES.

See INDICTMENT, 4, 5, 6.

FARMING ON SHARES.

See CROPS.

FINDING OF LAW AND FACT.

See PRACTICE, 6.

FORECLOSURE.

See STATUTE FORECLOSURE OF A MORTGAGE.

GUARDIAN AND WARD, 1, 2, 3.
COMMON CARRIERS, 15, 17.

FOREIGN CORPORATION.

See COMMON CARRIER, 5, 6, 7.

FRAUD AND FRAUDULENT SALES.

1. On the trial of an action to recover damages for false and fraudulent representations of soundness, on a sale of sheep, which turned out to be diseased, the plaintiff excepted to a charge "that if defendant knew facts tending to prove that the sheep were unsound, and fraudulently concealed those facts, he is liable," and requested the court to omit the word "fraudulently," which request was refused, with the remark that "the word fraudulently might be omitted and the jury might infer fraud; but there must be fraud."—*Held*, on appeal, that there was no error. *Clark v. Bamer.* 67
2. The doctrine of *Binnard v. Spring* (43 Barb., 470), in this respect re-affirmed. *Id.*
3. The plaintiff, an individual banker, having turned out worthless notes to certain of his depositors in payment of their claims, fraudulently representing their notes to be good, sold his banking business, and took from the purchaser a bond of indemnity against all existing liabilities of the bank; after the sale the depositors sued him for the fraud; the purchaser being notified, defended, and judgment was recovered in the suit for the amount originally due the depositors; the plaintiff paid the judgment and brought an action on the bond to recover the amount paid.—*Held*, that the judgment was recovered upon a personal claim against the plaintiff, and the action was not maintainable. *Hart v. Messenger.* 446
4. The action for the fraud, also necessarily affirmed the receipt of the notes as payment and satisfaction of the depositors' claims, and payment of the judgment therein satisfied and extinguished them. *Id.*
5. The depositors' claims having existence against the bank at the date of the bond, if at all, by reason of the plaintiff's fraud, he could not maintain an action based upon such fraud. *Id.*

6. *Held*, further, that the plaintiff was not entitled to be subrogated to the rights of the plaintiffs in the judgment, as against the bank, by payment of the judgment. *Id.*

See **BILLS OF EXCHANGE, &c.**, 8, 9.
COMMON CARRIERS, 14.
INSOLVENT DEBTOR, 6, 7, 8.
PRINCIPAL AND AGENT.
SET-OFF.
VENDOR AND PURCHASER OF CHATTEL.

GENERAL TERM.

1. Two justices of the General Term may hold a term and hear and decide an appeal in which the remaining justice is incompetent to sit. *Van Rensselaer v. Witbeck.* 498
2. And, it seems, in the absence of the presiding justice, the two associate justices may hold a General Term. *Id.*
3. And that unless there is a failure to agree upon a decision of the appeal by two appellate justices in the department where the judgment or order appealed from is entered, where two of such justices therein are capable of sitting on the appeal or acting in the matter, there is no authority for a hearing of the appeal in any other department. *Id.*

GUARANTY.

See **MORTGAGE OF LAND**, 1, 2.
POWER AND AUTHORITY, 3.

GUARDIAN AND WARD.

1. If a general guardian makes a purchase in his character as such, he presumptively uses his ward's funds therefor. *Low v. Purdy.* 422
2. And if, on foreclosure sale of his ward's land, he purchases as general guardian, the effect is to merge and extinguish the mortgage, and he can obtain no title by so purchasing, which he can afterward

convey without authority from a court of equity. *Id.*

3. But if he can show the purchase to have been made with his own funds he may stand as assignee of the mortgage against his ward until he is reimbursed. (Per JOHN-SON, J.) *Id.*

HIGHWAY.

1. The omission of an overseer of highways, to deliver to the town clerk a list of the inhabitants in his road district liable to work on the highways as provided by section 21 of the statute respecting assessments for highway labor (1 R. S., 506), does not, it seems, avoid the assessment, made against persons so liable, by the commissioners of highways, etc. *Rinehart v. Young.* 354
2. It seems the provision of the statute in this particular, is merely directory. *Id.*
3. It seems that the "new inhabitants," whose names "shall from time to time, be added to the several lists, etc." (§ 26, *id.*), are new inhabitants, not of the road district, but of the town. *Id.*
4. And that in respect to all his land situate in the town, each inhabitant thereof is to be assessed for highway labor, in the particular road district in which he has his residence. *Id.*
5. But it seems, if one who owns land in the same town with his residence, but in a different road district, moves his residence to the land without having been assessed in respect thereof for highway labor, his name may be added to the list under section 26 as a name "left out," and be rated accordingly. *Id.*
6. The overseer of highways for road district No. 1, of the town of S., neglected to deliver the list required by section 21, to the town clerk of that town, and the commissioners of highways at the

proper time, prepared a list for the district from the list used in previous years, and placed upon it the name of the plaintiff who resided in road district No. 9, of the same town, but owned land in the former district. This list they delivered to the defendant as overseer of highways for district No. 1, who, when the plaintiff had soon after moved his residence to his land in district No. 1, assessed him for highway labor in respect of such land, and notified him to perform it, which he did in part, refusing to perform the balance; whereupon complaint was made by the overseer under the statute (§ 41) to a justice of the peace, the plaintiff was summoned, a fine imposed, and warrant issued for collection thereof (§§ 42, 43), under which his property was levied on and sold.—*Held*, that the plaintiff could not dispute the validity of the assessment in an action to recover the value of the property sold. *Id.*

7. *Beach v. Furman* (9 John. R., 229), distinguished. *Id.*
8. *Quere*, whether the overseers of highways in making the assessment, did not act judicially. *Id.*

See ASSESSMENT.

HORSE RAILWAY.

See ASSESSMENT.
INDICTMENT.

1. If an indictment shows a presentment by jurors "of the number and qualification required by law," the names or number of the jurors need not be stated therein or in the caption. *McGarry v. The People.* 227
2. And if it is stated that the jurors were "then and there in said court, etc., duly sworn," and presented the defendant upon their oaths it sufficiently appears that the presentment was upon the oaths so sworn. *Id.*
3. In an indictment for injuring the property of a corporation, the cor-

poration may be described by its usual and ordinary title, though different from its corporate name.

Id.

4. Where an indictment for obtaining property under false pretences, charged that the prisoner, with an intent to defraud one A. G., Jr., did "falsely pretend and represent to the said A. G., Jr., for the purpose of inducing the said A. G., Jr., to part with a yoke of oxen of the goods and chattels of the said A. G., Jr., that," &c., "by which said false pretences he," the prisoner "then did unlawfully obtain from the said A. G., Jr.," the oxen mentioned.—*Held*, that there was a substantial averment that the prisoner had obtained the property from the prosecutor by means of the false pretences made, and the latter's belief therein, and that the indictment was not defective in that particular. *Clark v. The People.* 329

5. The case of *The State v. Philbrick* (31 Maine, 401), commented upon and on this point disapproved. *Id.*

6. Where it is charged in the indictment that the prisoner obtained the property upon the security of his promissory note, through false and fraudulent representations as to his ability to pay the same, an averment of his neglect to make payment of the note is not essential. *Id.*

INDEMNITY.

See COMMON CARRIERS, 18.

INDORSEMENT.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, 6.

INHABITANT AND NEW INHABITANT.

See HIGHWAY, 3 TO 7

INJUNCTION.

See CONTEMPT.
CORPORATION, 5, 6.
DEED, 1.

INSOLVENT CORPORATION.

See PRACTICE, 1, 3.

INSOLVENT DEBTOR.

1. An order of a County Court (under art. 6, tit. 1, chap. 5, part 2, R. S.), directing the discharge of a debtor imprisoned in execution, is invalid on its face, unless it recites the proceedings necessary under the statute to vest the court with jurisdiction. *Bulymore v. Cooper.* 71
2. If the sheriff releases the debtor under an order omitting such recitals, when the court in fact had not jurisdiction to make it, he renders himself liable as for an escape. *Id.*
3. The court will not obtain jurisdiction to make the order of discharge unless the applicant verifies his petition at the time he presents it. *Id.*
4. Where, therefore, the sheriff released a prisoner in execution, under an order whose recitals showed the applicant's neglect to swear that he had not disposed of any part of his property with a view to the future benefit of himself or his family, and the order had, in fact, been made upon a petition which was not verified at the proper time, and was for that reason void.—*Held*, that he was not protected, but was liable for an escape. *Id.*
5. Whether the applicant for discharge can meet the requirements of the statute (§ 4), respecting "a just and true account of all his estate, etc.," by alleging, in his petition an adjudication and assignment in bankruptcy. *Quere.* *Id.*

6. If an insolvent, who is carrying on business with knowledge that he can no longer continue it, and that his property must be surrendered to his creditors, purchases goods upon credit without disclosing the circumstances to the vendor, his concealment thereof is equivalent to fraud, and his assignment of the purchased property for the benefit of his creditors will pass no title therein to his assignee. *Chaffee v. Fort.* 81

7. And this is so, although the purchase is made in the course of the purchaser's business. *Id.*

8. The same rule applies to a banker, who, under like circumstances, receives the money of his depositor. *Id.*

INSURANCE.

See ACCIDENT INSURANCE.
POLICY OF INSURANCE.
PREMIUM NOTE.

INTEREST.

See ACCOUNT STATED.
EJECTMENT.
EXECUTORS AND ADMINISTRATORS, 1, 2, 6.

INVESTMENTS.

See EXECUTORS AND ADMINISTRATORS, 1.

JOINDER OF ACTIONS.

See PLEADING, 2, 3.

JOINT AND SEVERAL DEBTORS.

1. In an action on a promissory note against the two joint makers thereof, one of whom establishes a defence on the ground of coverture, judgment may go against the other defendant. *McGuire v. Johnson.* 305

See ACTION, 1.
PARTNERSHIP, 3.
PAUPER.

JOINT STOCK ASSOCIATION.

See CORPORATION, 1 TO 6.
PLEADING, 1.

JUDGE'S CHARGE.

See FRAUD AND FRAUDULENT SALES, 1.
VERDICT.

JUDICIAL ACT.

See HIGHWAY, 8.

JUDGMENTS AND EXECUTIONS.

1. It is well settled, that after a mortgagee of chattels has taken possession of the mortgaged property, by virtue of a power in the mortgage, the mortgagor has no remaining interest in it, which can be seized and sold under execution, even though the mortgage debt is not due. *Nichols v. Mead.* 222

2. The amount secured by chattel mortgage was less than the cost of the property mortgaged; the provision for sale restricted the mortgagee to sales at cost price; there was provision for immediate possession and sale, and for return of surplus property after sales sufficient to pay the debt, and the condition was for payment within a year. — *Held*, the mortgagee having taken possession, that the mortgagor had no leviable interest in the property mortgaged, though within a year from the date of the mortgage. *Id.*

3. Possession of a chattel for an indefinite time, with an agreement to pay for its use, and an understanding with the owner that the holder may purchase at any time, does not constitute a leviable interest therein. *Hodge v. Adco.* 314

4. But where a chattel was so held, and a levy made thereon, and a sale of the chattel under execution against the property of the holder, who intermediate the levy and sale purchased the chattel.—*Held*, that the levy held good, notwithstanding a renewal, in due time, of the execution prior to an adjourned day of sale (the notice having been originally for a time not within sixty days from the date of execution), and although, previously to the execution sale, there had been a re-sale to the original owner, who knew of the levy. *Id.*

5. A few days after the sheriff had executed an *alias* execution upon a judgment for possession of real property, the defendant therein regained possession; and the *alias* writ being unreturned, the plaintiff, on its return day, upon order to show cause, obtained an order for a *pluries* execution on the judgment.—*Held*, on appeal, that the writ was properly allowed. *Id.*

6. It seems that it would have been otherwise if the *alias* writ had been returned satisfied. *Id.*

See ACTION.

EJECTMENT, 2 TO 6.

EVIDENCE, 5.

EXEMPTION OF SOLDIERS' PAY AND BOUNTY.

EXECUTORS AND ADMINISTRATORS, 5.

PLEADING, 4, 5.

PRACTICE, 9 TO 21.

JUDGMENT DEBTOR.

See ACTION, 1.

PLEADING, 4, 5.

JURISDICTION.

See APPEAL, 6.

INSOLVENT DEBTOR, 1 TO 5.

NON-IMPRISONMENT ACT.

JURY AND JURY TRIAL.

It seems that if a prisoner has not, under the act of 1869 (chap. 678), offered his own testimony upon his

trial, it is error if the court, against his objection, permit the counsel for the prosecution in addressing the jury, to comment on the omission as a circumstance against him, or a fact to be considered in determining the case. *Orandall v. The People.* 809

See EVIDENCE, 8, 9.

JUSTICE'S COURT.

See COURT OF A JUSTICE OF THE PEACE.

JUSTICE OF THE PEACE.

See NON-IMPRISONMENT ACT, 1, 2, 3, 4.
PRACTICE, 7.

LANDLORD AND TENANT.

1. The plaintiff made with the defendants, then in possession, and assuming to contract as agents, a parol agreement for the purchase of land, and its occupancy until the agreement should be fulfilled, and entered under the agreement, and planted oats. He was then expelled from possession by the defendants, who in due season harvested the oats, after forcibly preventing him from harvesting them, and he brought this action to recover their possession.—*Held*, that the plaintiff was rightly nonsuited. *Harris v. Frink.* 85

2. He did not occupy as tenant, and had no legal title, as such, to the oats which had been planted by him. *Id.*

3. A tenant for years has an equitable interest, to the extent of the value of the remainder of his term, in the surplus moneys arising upon a sale of the demised premises, under a mortgage given thereon, prior to his lease, where the lease is cut off by the foreclosure; and the court will order payment out of such surplus to

him or to a mortgagee of his lease, after satisfaction of any dower right or other prior claims upon the equity of redemption. *Clarkson v. Skidmore*. 238

4. The decision in *Burr v. Stenton* (52 Barb., 377), held not to control the decision of this case. *Id.*

See EJECTMENT, 2 TO 6.

LEASE.

See LANDLORD AND TENANT, 3.

LEASE IN FEE.

See EJECTMENT, 2 TO 6.

LEVY AND LEVIABLE INTEREST.

See JUDGMENTS AND EXECUTIONS, 1 TO 5.

LIEN.

1. The mechanics' lien law of 1844 (chap. 303, p. 451), made no provision for liens in favor of those performing labor, or furnishing materials for sub-contractors. *Cheney v. Wolf*. 188
2. The act of 1854 (chap. 402, p. 1086, extended in 1858 chap. 204, p. 824, to all the cities and counties in the State, except New York and Erie counties), provided for such liens, but required the notice of claim to be filed in the office of a town clerk; a requirement which could not be complied with except in the towns. *Id.*
3. Where, therefore, materials had been furnished upon property in Rochester for a sub-contractor, and the notice filed and claim docketed in the county clerk's office of Monroe county, after the act of 1854, but prior to that of 1869 (chap. 558, p. 1355), it was held that no lien had been obtained.

Quere. Whether the laws of 1854 (chap. 402), and 1858 (chap. 204), did not completely repeal the act of 1844. *Id.*

LIFE INSURANCE.

See POLICY OF INSURANCE, 1, 2.

LIMITATIONS, STATUTE OF.

1. The maker of a promissory note, over due, who owed the plaintiff, the indorser and holder thereof, several other distinct debts, paid him a gross sum, and took a receipt which appropriated the payment, in part, to interest due on the note, and recited that the sum so appropriated had been received from and paid by B., who was an accommodation indorser of the note without consideration, per hand of S. (the maker). The money had, in fact, been paid without B.'s authority or knowledge, but the plaintiff showed him the receipt, and he thereupon examined it and expressed his approval.—*Held*, that the payment took the case out of the statute of limitations as to such indorser. *Huntington v. Ballou*. 120

See PLEADING, 8

LITTLE VALLEY.

See POWER AND AUTHORITY, 1.

MARKET VALUE.

See EVIDENCE, 1, 2.

MARRIED WOMAN.

See JOINT AND SEVERAL DEBTORS.

MASTER AND SERVANT.

1. The plaintiff's intestate, employed by the defendant as a carpenter,

was directed by the foreman of the gang to go, for the purpose of his labor, on a scaffolding erected in one of the defendant's shops, and which was apparently safe and properly constructed; but was, in fact, unsafe and dangerous, and had been constructed by unskilled and wholly incompetent persons, and of poor and insufficient material; and on the plaintiff's intestate stepping thereon it gave way, causing injuries which resulted in his death.—*Held*, that in the absence of proof by whom the persons constructing the scaffolding had been selected, or under whose directions it had been constructed, the presumption was that such persons had been selected by, and the scaffolding erected under, the direction of the defendant; that on the foregoing facts appearing in evidence, the burden was on defendant to show that competent persons had been selected, or the scaffolding constructed in a proper manner; and that it was error to nonsuit the plaintiff, on the ground that the injury to the deceased was caused by the negligence of a fellow servant, or that no knowledge of any incompetency of the defendant's servants, or of any defectiveness of the scaffold had been brought home to the defendant, or that the persons guilty of the negligence causing the injury, had not been employed by the defendant, but by a competent agent of the defendant. *Brickner v. N. Y. C. R. R. Co.* 508

MECHANICS' LIEN LAW.

See LIEN.

MISTAKE OF FACT.

1. The plaintiff applied to the defendant to purchase a ton of hay; the defendant offered to sell him a quantity by measurement, giving him to understand that its dimensions would include a ton. The plaintiff took the quantity, and paid for a ton, but there was, in fact, much less than that in weight.

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In an action for the excess in price.—*Held*, that in the absence of fraud, there was a mutual mistake in a material fact, and the plaintiff could recover. *Scott v. Warner.* 49

MONEY HAD AND RECEIVED.

1. Upon a sale without writing, of standing grass, the vendee paid the whole price, entered, cut, and removed a portion of the crop, when he was stopped by the vendor.—*Held*, that the vendee was not entitled to recover the sum paid without allowance for the grass taken. *Watkins v. Rush.* 234
2. The complaint claimed damages for non-delivery of the grass, the answer was a general denial and plea of the statute of frauds.—*Held*, that evidence of the quantity of grass removed, was competent upon the question of damages. *Id.*

MORTGAGE AND MORTGAGEE OF CHATTELS.

1. A mortgagee of chattels cannot obtain a lien upon other similar chattels, as against a subsequent purchaser thereof, through a verbal agreement between himself and his mortgagor to consider them substituted in the place of those described in the mortgage. *Powers v. Freeman.* 127
2. And to protect himself against a subsequent purchaser of the mortgaged property, he must pursue the statute respecting the filing of his mortgage literally. *Id.*
3. Thus, where the mortgagor resided in the town of Antwerp, Jefferson county, and bought a farm, and stock thereon, in the town of Wilna in that county, and gave a mortgage on the stock, and a few days after moved his residence to the farm, and the mortgage was filed in the latter town.—*Held*, that it was void as against a subsequent bona fide purchaser. *Id.*

See **BILLS OF EXCHANGE AND PROMISSORY NOTES**, 3.
JUDGMENTS AND EXECUTIONS, 1, 2.

MORTGAGE OF LAND.

1. B. was indebted to a bank, and executed to it his bond for an amount equal to part of the indebtedness, conditioned to pay at a time specified; he then joined with his wife in a mortgage of her separate real property, securing to the bank the payment of the sum named in the condition of the bond, according to the terms thereof, and delivered it, agreeing that it should remain a continuing security in the hands of the mortgagee for payment of all his liabilities then existing,—something more than double the amount secured,—and also, for all those he might afterward incur. The bank had no actual notice that B. was not owner of the mortgaged property, but the deed to B.'s wife was recorded. B. never paid his original indebtedness. He obtained extensions of the time of payment after the maturity of the liability secured by the mortgage, and became still more largely indebted to the bank, and so remained at the time of his decease. In an action by the bank to foreclose the mortgage.—*Held*, that it was, originally, a valid collateral security for payment of the existing indebtedness covered by B.'s bond. *Bank of Albion v. Burns*. 52
2. That it was not a continuing guaranty for future advances to B., he having no presumptive authority from his wife, to make an agreement in that respect. *Id.*
3. That the plaintiff was charged with notice that the owner of the land, pledged it as surety for B.'s debt. *Id.*
4. That the land was discharged from the lien of the mortgage by the indulgence given to the principal debtor. *Id.*
5. W. owned and mortgaged certain premises to T. by several mort-

gages, then conveyed by deed, intended as a mortgage to C., and then in consideration of all the debts so charged upon the premises (that upon the conditional deed being paid by T.), conveyed the same to T., and at the same time obtained a conveyance thereof to him from C., whereupon T. gave C., for the benefit of W., an offer in writing to resell before a specified time, at a sum equal to the consideration of the conveyances to T., and mutual releases under seal were exchanged between T. and W. In an action by W. to redeem from T. after the expiration of the time named in the offer, it appearing that the conveyances to T. were intended to satisfy and extinguish the mortgage debts to him of W.—*Held*, that such conveyances were not merely mortgages, but absolute deeds. *Whitney v. Townsend*. 249

See **ASSIGNMENT OF MORTGAGE**, 1.
COMMON CARRIER, 15 TO 19.
GUARDIAN AND WARD, 1, 2, 3.
LANDLORD AND TENANT, 3.
STATUTE FORECLOSURE OF A MORTGAGE.
USURY.

MOTIONS.

See **PRACTICE**, 10, 11, 12, 17, 33.

MUTUAL INSURANCE.

See **PREMIUM NOTE**.

NEGLIGENCE.

1. A canal boat captain, in charge of the plaintiff's boat, having reason to think, and believing, that the gates of a lock were in bad repair and insecure, in the absence of the lock-tender, undertook to take the boat through the lock, as by custom in such case he was authorized to do. He had no notice from the defendant, whose duty it was to keep the lock in safe condition, that it was insecure; boats had been passed through the lock

up to the time in question; and it was to be inferred from the evidence, that the captain believed he could pass the boat safely through; the gates gave way, and the boat was injured and delayed for repairs.—*Held*, that the plaintiff was entitled to recover damages on account thereof. *Johnson v. Belden.* 433

See COMMON CARRIERS, 12, 13.
MASTER AND SERVANT.

NON-IMPRISONMENT ACT.

1. The affidavit presented to a justice of the peace under the act to abolish imprisonment for debt (1831, ch. 800, § 33), as the basis for a short attachment, need not state facts showing any fraudulent or improper act, as required in the affidavit on application for a long attachment. (Per FOSTER, J.) *Stevens v. Benton.* 156
2. But *quere*, whether an objection that the affidavit does not state the facts which show that the claim is on contract, and which render a warrant impossible under section 30, is not available to the defendant. *Id.*
3. When it appears on the return of an attachment issued under section 33, that property has been attached, but that a copy of the inventory and attachment have not been personally served, the justice obtains no jurisdiction of the person until the return of a summons. (§ 38.) *Id.*
4. If therefore, the defendant appears on return of the summons, joins issue, &c., without objecting to the sufficiency of the affidavit upon which the attachment issued, he waives an irregularity in that respect; and this is so, although he appeared specially for the purpose and took the objection on return of the attachment. *Id.*

NONSUIT.

See EVIDENCE, 9.
MASTER AND SERVANT.

NOTICE.

See APPEAL, 1, 2, 3.
COMMON CARRIERS, 12, 13.
LIEN, 1.
MORTGAGE, 1, 3.

NOTICE REQUIRED TO BE FILED IN A TOWN CLERK'S OFFICE.

See LIEN, 1, 2, 3.

OFFER TO COMPROMISE.

1. The provisions of section 385 of the Code, allowing an offer of judgment, &c., by the defendant to the plaintiff, are not applicable to equitable actions; *e. g.*, an action to foreclose a mortgage. *Stevens v. Veriane.* 90

ORDER.

See PRACTICE, 15, 16, 17, 23.

ORDER OF COUNTY COURT

See INSOLVENT DEBTOR, 1 TO 5.

OVERSEER OF HIGHWAYS.

See HIGHWAY, 1 TO 8.

OWNERSHIP IN COMMON OF CHATTELS.

1. One of two owners in common of a chattel, being in sole possession, let it for an agreed price. The hirer was ignorant of the ownership in common, but being afterward notified of it, refused when the hire was due, to pay his bailor more than that portion thereof, which represented the latter's interest; the bailor sued to recover the balance, and the hirer set up an assignment of the same from the other owner in common, and that upon an accounting for profits of the chattel, a balance would be found due to him as such as-

signee, but failed to establish the latter allegation.—*Held*, that the bailor could recover the balance of the price agreed. *Foster v. Magee*. 182

2. Owners in common of grain or other personal property, in its nature separable in respect to quantity and quality by weight or measure, may sever their portions of the common bulk at will; and where one of such owners is in possession of the whole, his refusal to permit the separation by another owner, of the latter's share, is equivalent to conversion, and trover will lie in consequence. *Channon v. Lusk*. 211

PARENT AND CHILD.

See PAUPER, 1, 2.

PARTIES TO ACTION.

See APPEAL, 1, 2.
PAUPER, 4.
PLEADING, 1, 2, 3.

PARTNERSHIP.

1. After notice has been given to a firm creditor by each of the partners, that one of them has withdrawn, and that the other will continue the business, and has agreed to pay individually the firm debts, transactions between the creditor and continuing partner must be considered with a reference to the new relations of principal and surety existing between the late partners, in determining the question whether any such transaction amounts in favor of the retired partner to a payment of the firm debt. *Colgrove v. Tullman*. 97
2. Where a member of a partnership firm advances money for its business beyond what is required of him by the copartnership agreement, he is entitled to interest on such advances. *Lloyd v. Carrier*. 364

3. An agent of the firm after its dissolution and a settlement of the firm accounts between the members thereof, except as to an outstanding partnership claim, collected the claim, and paid it over, in different amounts to two of the partners, there being five altogether. One of the partners, who had received none of the moneys, sued all the rest for an accounting, claiming to recover his proportion of the sums so paid; the referee, without ascertaining the amount which each partner had received, directed judgment against them all as claimed.—*Held*, that there was no joint liability of the defendants, but that they were liable severally for the plaintiff's proportion of the sum received by them respectively, and that such sums being unascertained the judgment was erroneous and must be wholly reversed. *Rhiner v. Sweet*. 386

See ACCOUNT STATED.

APPEAL, 2.
CORPORATION, 1, 2, 3.
PAYMENT, 1.
PLEADING, 2, 3.

PAUPER.

1. An order for the support of a poor person, under 1 R. S. 614, § 1, *et seq.*, is not invalid, because two out of five children of such person, are directed to furnish the support, nor because they are directed to contribute thereto, in unequal amounts. *Stone v. Burgess*. 439
2. The liability of the children charged by the order is several, and either is liable on default, in an action to recover the payment required of him by the order. *Id*.
3. An action also lies for the costs awarded on granting such order, against the parties severally charged therewith under section 6. *Id*.
4. In counties where all the poor are a charge upon the county, the action is properly brought by the superintendent of the poor (§ 13). *Id*.

PAYMENT.

1. In June, 1864, T. sold out his interest in the firm of B. & T. to B., who assumed payment of the firm debts; C., the holder of a firm note, was duly notified of the dissolution and assumption, and was requested by T. to collect the note at once; payments on the note were made by B., and when, in June, 1865, C. formally demanded payment in full, for the purpose, as he said, of investing in United States bonds, B., who held bonds more than sufficient to balance the note, offered to give C. instead of money, a receipt for an equal amount of bonds; the balance due on the note and its equivalent in bonds, were adjusted between them, and B. gave C. a receipt, stating that he had received from C. the bonds, to be held by him for safe keeping, and to be returned to C. on surrender of receipt, which was duly stamped and delivered; the note was not, in fact, surrendered by C., and the bonds remained in possession of B., who made a further payment on the note, and in July, 1866, made a general assignment for the benefit of creditors; C. then demanded possession of the bonds, but did not get them, and subsequently, for the first time, demanded payment of the note from T., and on refusal sued B. & T. on the note; B. had told T. that the note was paid, but on the trial before a referee there was a conflict as to whether C. had promised to surrender the note and hold the receipt in its stead. On appeal by T. from a judgment for the plaintiff.—*Held*, reversing the referee's finding of fact, that the receipt for the stock was taken in payment of the note, and the judgment against the appellant could not be sustained. *Colyrore v. Tallman*. 97

See EVIDENCE, 6.

LIMITATIONS, STATUTE OF, 1.
MONEY HAD AND RECEIVED, 1, 2.
POLICY OF INSURANCE, 1.

PAYMENT OF FREIGHT.

See BILL OF LADING.

PERFORMANCE.

See STATUTE OF FRAUDS, 1, 2.

PLEADING.

1. When the defence in an action against members of an association jointly liable, is a non-joinder of all the associates as defendants, the parties omitted must be pointed out by name, or judgment will go against the defendants named. *Kingsland v. Braisted*. 17
2. Nor when the action was brought by a firm, several of the partners being also members of the association, but not joined as defendants, and the defence of non-joinder is not properly pleaded, is an objection available to the defendants, that one member of the association may not sue another. *Id.*
3. And upon the authority of *Cole v. Reynolds* (18 N. Y. Rep. 74), the joinder of law and equity jurisdiction, under the Code, would render the objection unavailing as to defence. (Per INGRAHAM, J.) *Id.*
4. The plaintiff sued the representative of a deceased judgment debtor, and the surviving co-judgment debtor, upon a judgment in usual form, recovered nearly twenty years previously on contract against the defendants therein, alleging execution returned unsatisfied against the said defendants and the insolvency of the survivor.—*Held*, on demurrer, for want of a cause of action, that the complaint was good. *Stahl v. Stahl*. 60
5. It is sufficient, in such an action, if the complaint states the survivor's insolvency, without averring the issuing and return of an execution unsatisfied against him. *Id.*
6. Where the complaint averred a wrongful taking and carrying away, and conversion of the plaintiff's timber from certain described premises, and the answer denied the plaintiff's ownership of the *locus in quo*, and evidence had been admitted without objec-

tion on the trial, to prove injury to growing timber. — *Held*, that a cause of action for trespass to land was sufficiently pleaded. *Philips v. DeGroat*. 192

7. Where the complaint alleged the taking of goods "particularly mentioned in the affidavits heretofore served upon the defendant in this action."—*Held*, that the affidavit was for the purpose of describing the goods, made part of the complaint. *Nichols v. Mead*. 232

8. The plaintiff brought a suit on the 2d December, 1867, to recover upon an annuity charged, in his favor, on the defendant, from January 1st, 1855, and the complaint averred that no part of the annuity had ever been paid. The defendant pleaded the statute of limitations. On the trial the plaintiff proved, without objection, a payment by the defendant on account of the annuity on the 1st January, 1864.—*Held*, that the referee was justified in reporting in the plaintiff's favor for the sums falling due after January 1st, 1858. *Mensch v. Mensch*. 235

See ASSIGNMENT OF MORTGAGE, 2.
EXECUTORS AND ADMINISTRATORS, 7.
EVIDENCE, 5.
INDICTMENT, 1 TO 7.
PRACTICE, 4.
MONEY HAD AND RECEIVED, 1, 2.

PLEDGE.

See VENDOR AND PURCHASER OF LAND, 3.

POLICY OF INSURANCE.

1. A life insurance company issued a policy, which became forfeited by failure of the insured to meet the premiums according to its terms. The insured, however, called at the company's office, inquired of its clerk if she might pay the premiums; was informed by him that she might, and of their amount, which she promised to call and

pay; but the clerk offering to call and receive it at her house, she afterward made the payment to him there and received separate receipts for the several premiums, signed by him for the secretary of the company. The payment was brought to the knowledge of the company's cashier, but he did not nor did the company ever receive the premiums paid. The clerk had sometimes been employed to collect premiums on non-forfeited policies, but had no authority to receive premiums upon those which were forfeited. In an action upon the policy to recover the insurance as provided therein.—*Held*, that the forfeiture had not been waived, and the plaintiff could not recover. *Koelges v. Guardian Life Ins. Co.* 480.

2. *Held*, further, that it was error to reject as evidence, on the trial of the action, the company's charter and by-laws. *Id.*

See ACCIDENT INSURANCE.

POWER AND AUTHORITY.

1. The supervisors of Cattaraugus county had power under the act of April 17, 1865 (chap. 479, p. 860), to appoint three building commissioners, to locate and erect county buildings at Little Valley, who should have authority to consider donations of land and money in determining the location; by their resolution of appointment they directed their appointees to select and procure the title to a proper site for a sum not exceeding one dollar, and to proceed to erect the buildings thereon, but neither to obtain the title, nor take any binding steps until security should be given by bond of individuals and otherwise, guaranteeing payment for erection of the buildings without expense to the county.—*Held*, that the power to accept donations of money was vested in the supervisors, by whom provision for supplying the means to erect the buildings had to be made, and not in the building commissioners, and that a bond given

as security for payment of donations, under the resolution, was within the policy of the law and valid. *Marsh v. Chamberlain*. 287

2. And the said building commissioners having proceeded according to the terms of the resolution to locate, erect and furnish the county buildings, in part upon the faith of a bond given to secure payment of money promised in that respect.—*Held*, that such bond was founded upon sufficient consideration. *Id.*

3. And that one who had at the day of its date, and before delivery, indorsed upon the same over his signature, "I guarantee payment of the within bond," was bound by the guarantee, and that this was so, irrespectively of the amendment of the statute of frauds. (1863, chap. 464.) *Id.*

4. The act of 1868 (chap. 13, § 1), authorizing an assignment of the bond to the supervisor of Little Valley.—*Held*, that an assignment made to said supervisor of the same with the guarantee, would be presumed to have been made under that act. *Id.*

5. And any two of the building commissioners being authorized to erect the county buildings (1865, chap. 861, § 3).—*Held*, that an assignment of such bond and guarantee by that number of said commissioners was sufficient, as an act incidental to the duties devolved upon them. *Id.*

See ASSIGNMENT OF MORTGAGE, 4, 5, 6.

POWER OF DISPOSITION.

See DEVISE, 2, 3.

PRACTICE

1. Equity will entertain an action brought by the receiver of an insolvent corporation against its stockholders and creditors, to en-

force the liability of the stockholders, as such, to the creditors, and to restrain the creditors from prosecuting the stockholders upon such liability. *Calkins v. Atkinson*. 12

2. So held, upon the authority of *Storey v. Furman* (25 N. Y., 214). *Id.*

3. It seems, a receiver's action to recover from stockholders their unpaid subscriptions to the stock of an insolvent corporation, must be brought against each stockholder separately. *Id.*

4. It seems one cannot try his title to the land by an action to recover possession of the harvested crop. *Harris v. Frink*. 35

5. A case for submission, under section 372 of the Code, must present an actual controversy for adjudication between the parties, and also indicate the judgment desired, or it will be dismissed. *Williams v. City of Rochester*. 169

6. When a specific exception is taken to an erroneous conclusion of law, founded upon a clear and indisputable fact found by the referee, and on which alone he bases his erroneous conclusion, the appeal must be determined on the exception, and the court will not review the evidence nor presume other facts to have been found by the referee, in order to sustain the judgment. *Armstrong v. Bicknell*. 216

7. Where the possession and withholding of personal property, obtained through an execution sale thereof, constituted the unlawful taking and conversion in an action therefor, and the summons was delivered for service by a justice of the peace to a person duly deputized by him, though not a regular constable, before the sale, and was served on the defendants immediately after.—*Held*, that the action was commenced before the cause of action accrued, and that it could not be sustained. *Hodge v. Adee*. 314

8. Neither section 430 nor section 432 of the Code, confers upon the attorney-general, the power to prosecute an action in the name of the people, against commissioners appointed under an act of the legislature, to restrain them from issuing, etc., town bonds, provided for by such act, without performance of the conditions precedent required thereby; nor has he such power at common law. *People v. Miner.* 396
9. After trial of an action by the court, the successful party, unless by express direction or special agreement, is not required to submit a draft of the judgment, before entry thereof, to the adverse party, or have it settled upon notice. *People v. Church.* 459
10. *Semble*, That upon a motion to set aside, or modify a judgment, on the ground that no notice was given of its settlement, its entry, in some material particular, otherwise than in accordance with the findings of law, or fact, must be pointed out. *Id.*
11. A motion to set aside a judgment, is not the proper remedy for an omission to find a fact, supported by the evidence. *Id.*
12. *Semble*, That if the fact is established by uncontroverted evidence, the remedy is by appeal. *Id.*
13. And that when the evidence upon the fact is conflicting, the course is to deliver to the judge, when the case is presented for settlement, a request to find the desired facts and conclusions of law, and that exception lies for his refusal. *Id.*
14. Where the decision after a trial by the court, provided for a decree, among other things, directing a delivery by the receiver appointed in the action, of the property in controversy, to certain of the defendants, and the decree had been entered pursuant to the decision,—*Held*, that assuming the judgment to be still incomplete, so that no appeal could be taken thereon, and that so much of the decree as directed such delivery was in the nature of an interlocutory order, an appeal would lie therefrom, as such, and proceedings taken in pursuance of the same, could not be set aside on motion at Special Term. *Id.*
15. An order, granted on affidavits showing a decision made in an action, but that judgment had not been entered thereon, and staying proceedings on "the decision," does not stay proceedings on the judgment, and if served after judgment entered, is *functus officio* when served. *Id.*
16. After the entry of judgment in an action by the people, declaring the rights of certain defendants to the exclusion of others, to hold and exercise the office of directors of a railroad corporation, vacating a receivership, and directing delivery of the property of the corporation to the directors declared to be entitled, it seems an order staying "all proceedings upon the judgment until the entry of an order on a motion to set aside the judgment," does not stay proceedings to obtain possession from the receiver of the keys of the corporation safe and property. *Id.*
17. An order granted upon order to show cause after service of such stay of proceedings, no steps having been taken under it, will not be set aside upon a general motion to set aside the judgment and proceedings taken thereupon. *Id.*
18. Nor does an appeal and undertaking thereon stay such proceedings. *Id.*
19. And it seems, in such a case, when the judgment is entered upon the direction of a single judge, in order to stay proceedings on the judgment, as to so much thereof at least as respects the delivery and taking possession of the property ordered to be delivered, security must be given as provided in section 336 and 338 of the Code. *Id.*
20. Nor would the court, as grounds for setting aside the proceedings, taken in the exercise of legal rights, inquire into the motives of the parties taking them. *Id.*

21. It is not irregular for the judge, before whom a trial is had, to furnish the successful party with his findings before they are filed or to permit the attorney for such party to draw up the proposed findings. *Id.*

22. The practice in this respect stated and approved per TALCOTT, J. *Id.*

23. A certificate and certain affidavits used on the motion below, held to be irrelevant and the affidavits scandalous, having been stricken out of the motion papers by the order appealed from.—*Held* that the order in this respect, should be affirmed. *Id.*

See APPEAL.

CONTEMPT.

CORPORATION, 1, 2, 4.

EXECUTORS AND ADMINISTRATORS, 7 TO 13.

GENERAL TERM.

INDICTMENT, 1, 2, 3.

INSOLVENT DEBTOR, 1, 3 TO 6.

JOINT AND SEVERAL DEBTORS.

JURY AND JURY TRIAL.

OFFER TO COMPROMISE, 1.

PARTNERSHIP, 3.

SURROGATE AND SURROGATE'S ORDER, 1 TO 6.

VERDICT, 1.

PRACTICE AT THE TRIAL.

See JURY AND JURY TRIAL.

PREMIUM NOTE.

The charter of a mutual insurance company provided, that upon alienation of property insured, the policy should be void and surrendered for cancellation, and the assured entitled, upon the surrender and payment of his proportion of the losses incurred prior thereto, to his premium note, but that the alienee might have the policy, if assigned to him, ratified for his benefit, on giving security for the sum remaining unpaid upon such note, and thereupon should be entitled to the privileges, and subject to all the liabilities

ties of the party originally owning the policy; the defendant, who held a policy for which he had given his premium note, to be paid in sums, and at times, as required under the charter and by-laws of the company, by the directors, conveyed the insured property, and with the company's assent assigned the policy to his grantees and it was then by like assent reassigned to the defendant as collateral security for a debt due him from the grantee, who had also given a note in like terms with that of the defendant to the company; the company also retained the defendant's note and the latter paid assessments upon it for losses, happening after the assignments of the policy. In an action by a receiver of the company against the defendant on his note.—*Held*, that the defendant was not liable thereon, and the plaintiff could not recover. *Miner v. Judson* 300

PRESUMPTION AND PRESUMPTIVE EVIDENCE.

See ASSIGNMENT OF MORTGAGE, 4, TO 7.

EVIDENCE, 6.

POWER AND AUTHORITY, 4.

PRACTICE, 6.

PRINCIPAL AND AGENT.

1. An association carrying on the manufacture and sale of cheese, and owning a factory and machinery suitable for its business, made, through its managing committee, a year's lease of the same to C., agreeing to provide him utensils and conveniences, in good order, for the manufacture of cheese; C. thereupon agreed to pay \$600 rent and taxes of the premises; manufacture into cheese in a skillful and workmanlike manner the milk (restricted to the produce of 800 cows) furnished the factory; provide materials for use in the manufacture; box and prepare the cheese for market, half according to a size named, the rest according to hoops to be provided

by the committee, insure them while remaining at the factory, and deliver them thereat as the committee should direct. It was a further part of the agreement, that each "patron" or person supplying milk, should have a proportionate part of the whey, either fed to his stock, at so much per head on the premises, or delivered to him thereat, and that C. should account for half the proceeds of surplus whey sold by him; that C. should keep accounts, make a statement of each sale of the cheese, exhibiting the proportionate amount due to each patron from such sale, on account of milk furnished by him after deducting the price of manufacture and charges for keeping and feeding stock; pay the rent agreed, to the committee by deductions from the proceeds of sales in proportionate sums, as due thereat respectively, omitting the two first sales; give the business all necessary personal attention; not under let it, and at the expiration of his lease surrender in good order, etc. The committee agreed that the patrons should furnish C. one good rennet for the milk of each cow, and pay him a percentage upon each 100 pounds of cheese sold and delivered. C. entered into the premises and manufactured cheese, some of which was sold to the plaintiff as good merchantable cheese, on behalf of the association by the defendants, who with one P. constituted the committee, and who were also patrons of the association and interested as such, in the sale. The cheese so sold had been fraudulently manufactured of sour curd by C. and his employes, and was of bad quality on that account. In an action to recover damages for fraud in the sale.—*Held*, that the defendants were liable for the fraud of C. and his employes and servants, on the ground of their agency for the defendants in manufacturing the cheese, and although the defendants might, in fact, have been ignorant thereof. *Durst v. Burton*.

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See COMMON CARRIER, 12, 13.
DEFENCES, 3.

See DELIVERY, 1.
MASTER AND SERVANT.

PRINCIPAL AND SURETY.

See MORTGAGE OF LAND, 1, 5.
PARTNERSHIP, 1.

PROMISSORY NOTES.

See BILLS OF EXCHANGE AND PROMISSORY NOTES.

PUBLICATION.

See WILL, 1, 2, 3.

PUBLIC POLICY.

See CONSPIRACY.

QUESTION OF FACT.

See EVIDENCE, 8.

RAILROAD.

See ASSESSMENT.
COMMON CARRIER, 4 TO 11, 15
TO 19.
MASTER AND SERVANT.

RATIFICATION.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, 6.
LIMITATIONS, STATUTE OF.

REAL ESTATE.

See ASSESSMENT.

RECEIVER.

See PRACTICE, 1, 2, 3.
COMMON CARRIERS, 15, 16.

RECORDING ACTS.

1. The assignee of a mortgage is a purchaser of "real estate" within intent of section 1 of the recording act (1 R. S., 756); and the assignment being made in good faith and for a valuable consideration, he is protected by the record thereof against a release subsequently made by his assignor. *Belden v. Meeker.* 471
2. The principles of the recording acts are extended by the Revised Statutes to assignments of mortgages. Upon this point *Vanderkemp v. Shelton* (11 Paige, 38) reaffirmed, and *Hoyt v. Hoyt* (8 Bosw., 577) distinguished and explained. Per TALCOTT, J. *Id.*

REDEMPTION OF LANDS.

See EJECTMENT, 2 TO 6.

REFEREE.

See APPEAL, 7.
COSTS, 1.

RELEASE OF MORTGAGED PREMISES.

See RECORDING ACTS, 1.

RENT.

See EJECTMENT.

RESIDENCE.

See EVIDENCE, 11, 12.

RES JUDICATA.

See HIGHWAY, 6, 7.

ROAD DISTRICT.

See HIGHWAY.

SEDUCTION UNDER PROMISE OF MARRIAGE.

See EVIDENCE, 8.

SERVICE OF PAPERS.

See CONTEMPT.

SET-OFF.

In an action to recover a balance due upon a contract for sale of two separate patented processes, described in a single written agreement, for an entire sum payable in installments.—*Held*, that the vendee was entitled to set-off damages arising out of the vendor's fraudulent representations as to one of the processes, although the other proved to be more valuable than the price paid for both. *Rawley v. Woodruff.* 419

SHERIFF.

See INSOLVENT DEBTOR, 2, 3.

SPECIFIC PERFORMANCE.

See CONTRACT, 2.

STATUTE FORECLOSURE OF A MORTGAGE.

The heir's title to land is not divested by foreclosure sale under the statute (2 R. S., 545), without service of the notice of sale, on the personal representatives appointed upon the estate of the deceased mortgagor. *Low v. Purdy.* 422

STATUTE OF FRAUDS.

1. Performance by one party of his part of an unwritten contract, which by its terms, is not to be performed by the other party within one year, will not take the case out of the statute of frauds, so as to sustain an action at law against the latter for damage for non-performance. *Weir v. Hill*. 278
2. H. received a dollar, under agreement to invest it in sheep, and double them every four years, until W. came of age, and then to deliver them to him, and made the investment accordingly.—*Held*, that W. at majority could only recover the money received by H. to invest for his benefit, with interest. *Id.*

See DEFENCES, 2, 4.

LANDLORD AND TENANT, 1, 2.
MONEY HAD AND RECEIVED, 1, 2.
POWER AND AUTHORITY, 3.

STATUTE OF LIMITATIONS.

See LIMITATIONS, STATUTE OF.

STAY OF PROCEEDINGS.

See PRACTICE, 15 TO 20.

STOCKHOLDERS.

See PRACTICE, 1, 2, 3.

SUBMISSION OF CONTROVERSY.

See PRACTICE, 5.

SUPERVISORS.

See POWER AND AUTHORITY.

SUPREME COURT.

See GENERAL TERM.

SURROGATE AND SURROGATE'S ORDER.

1. The surrogate, having made an order directing an executor to pay moneys in accordance with a decree entered upon his accounting may, if he neglects to comply with the order, and although it does not appear that execution has been issued on the decree, arrest the executor by attachment. On return of the attachment, the executor may show cause against his commitment. *Saltus v. Saltus*. 9
2. The remedy against a surrogate's *ex parte* order is, it seems, by motion to the surrogate, and not by appeal. *Id.*
3. The claims set forth in an executor's petition for authority to sell, mortgage or lease his testator's real estate (3 R. S., 102, § 1, etc.), were in the aggregate \$4,314; upon the hearing the executor admitted funds in hand to the amount of \$1,332, and formal proof was given of liabilities of the estate to the extent of \$1,723; the surrogate, without hearing further proof, directed the sale of a farm valued at \$6,200.—*Held*, on appeal, that the order should be affirmed. *Barnett v. Kincaid*. 320
- Held*, further, that the surrogate might refuse upon the hearing to hear testimony offered for the purpose of establishing a disputed claim. *Id.*
5. *Quere*. Whether the surrogate may direct the leasing of land, on such an application, where all the parties interested in the real estate are adults. *Id.*

See EXECUTORS AND ADMINISTRATORS, 7.

TAXATION OF COSTS.

See EXECUTORS AND ADMINISTRATORS, 8 TO 13.

TENANT BY THE CURTESY.

The estate of tenancy by the curtesy survives to the husband on the decease of his wife, in all her real property, to which it would have attached at common law, and over which she has not exercised the power of disposition given by the married woman's act of 1848 and 1849. *In the matter of Frances M. Winne an infant.* 21

So held, reversing the decision at Special Term in this case. *Id.*

TENANT IN COMMON.

See CROPS.
OWNERSHIP IN COMMON OF
CHATTELS.

TRESPASS.

See EVIDENCE, 10.
DEFENCE, 1, 2.

TRESPASS TO LAND.

See PLEADING, 6.
VENDOR AND PURCHASER OF
LAND, 1, 2.

TRIAL.

See EVIDENCE.
DEFENCE, 1, 2.

TRUST.

See EXECUTORS AND ADMINISTRATORS, 6.

TRUSTEES.

See COMMON CARRIERS, 15 TO 19.

UNCERTAINTY.

See CONTRACT, 2.

USURY.

The defendant took a mortgage from the plaintiff, and gave back an agreement to pay the mortgagor the amount secured, with interest, and also to discharge the interest on the mortgage; the bond and mortgage were then transferred by the mortgagee to the superintendent of the banking department, as security for circulating notes issued to the former, equal in amount to the sum secured, and it had been given for the purpose of such transfer.—*Held*, that the transaction was not usurious. *Perrine v. Hotchkiss.* 416

VARIANCE.

See PLEADINGS.

VENDOR AND PURCHASER
OF CHATTELS.

1. A vendor who has been induced to sell his goods by fraudulent representations, is not estopped from ratifying the sale by any act of disaffirmance which is not effectual for that purpose, and does not extend to the entire contract. *Kinney v. Keirnan.* 492
2. Thus where the vendee obtained a sale of goods for the checks of a third person which he fraudulently represented as good, and which came back to the vendor under protest, and the latter sued a purchaser of part of the goods from the vendee, after demand upon such purchaser and his refusal to deliver the same, to recover the value thereof, but without notice of disaffirmance to the fraudulent vendee, and return, or offer of return to the latter, of the protested checks.—*Held*, that there was not such disaffirmance of the contract of sale as prevented a subsequent action thereon. *Id.*
3. And a suit by such vendor against the vendee to recover the whole price, and settlement of the suit, with receipt of part of the sum

agreed to be paid thereon, is a ratification of the contract, and will bar proceedings for the fraud.

Id.

4. The vendor, after demand and refusal, brought an action against one to whom his fraudulent vendee had sold a portion of the goods, and afterward sued such vendee to recover the whole price due upon the sale to him, and then made a settlement of the latter suit for a sum agreed on, on which sum he received a part payment.—*Held*, that the last suit was an affirmance of the contract, and a bar to a recovery in the former suit, and that this was so, although by agreement at the time of the settlement, the subject-matter of the first suit was reserved therefrom.

Id.

5. *Pearse v. Pettis* (47 Barb., 276), cited and explained.

See **BILLS OF EXCHANGE AND PROMISSORY NOTES**, 3.
FRAUD, AND FRAUDULENT SALES, 1, 2.
CONTRACT, 1.
INSOLVENT DEBTOR, 6, 7, 8.
JUDGMENTS AND EXECUTIONS.
MISTAKE OF FACT, 1.
SET-OFF.

VENDOR AND PURCHASER OF LAND.

1. By the terms of a contract for sale of timbered land, the vendee agreed that half of all the timber prepared for market should be applied upon the purchase, and that he would not remove any timber without the vendor's consent until the purchase-money should be paid; he was to pay the taxes, and have a deed on full compliance with the terms of the contract; and, on his failure to perform, it was provided that the vendor should have the right to take possession.—*Held*, that the vendee had a right of immediate entry, and though not in actual occupancy at the time, such constructive possession under the contract as enabled him to maintain

trespass against one who wrongfully cut timber on the premises.
Phelps v. De Groat. 192

2. *Held*, further, the vendee having contracted for sale of the land, with reservation of the timber, and for its possession, "except so far as relates to the timber," that he could maintain trespass against one who entered under an assignee of his contract of sale, and cut down trees.

Id.

3. And that an action against such assignee, for the conversion of timber previously cut upon the premises, would lie by the said vendee by reason of his special property therein, and that, if the effect of the agreement with his vendor was to pledge the timber as security, he was entitled to show a waiver, or fulfillment of the conditions of the pledge.

Id.

See **CONTRACT**, 2.

GUARDIAN AND WARD, 1, 2, 3.
LANDLORD AND TENANT, 1.
MONEY HAD AND RECEIVED, 1, 2.

VERDICT.

A verdict improperly influenced, by misdirection of the judge, will be set aside on motion upon a case made, although no exception has been taken at the time of the charge. *Benedict v. Johnson*. 94

WAIVER.

See **EXECUTORS AND ADMINISTRATORS**, 11, 12.

WATER PRIVILEGE.

See **DRED**, 1

WILL.

1. Unless the testator declares, or gives the witnesses in some form to

understand, at the time of making or acknowledging his subscription, that the instrument signed is his will, there is no sufficient publication. *Bagley v. Blackman.* 41

2. Accordingly, where the witnesses had been sent for to witness the testator's will, and went for that purpose, but had no other information that they were witnessing his will.—*Held*, that the publication was insufficient. *Id.*

3. A will was executed in the presence of the draftsman, a person accustomed to drawing such instruments, and of two witnesses, in the following manner: The testatrix signed the instrument in the presence of the witnesses, and in response to a question put by the draftsman, acknowledged it to be her last will; the draftsman then said to one of the witnesses, "now Mr. W.," and, handing him the pen, the latter signed the attestation clause, which was full, and handed the pen to the other witness, who also signed in like manner. The will was in possession of the testatrix at the time of her death.—*Held*, that it was duly published and executed. *Smith v. Smith.* 266

See DEVISE AND BEQUEST, 2.

WITNESS.

1. A medical expert, called as a witness is not qualified to express an opinion based on previous testimony in the case, where he has not heard all the testimony which may have been material to the subject of inquiry. *Carpenter v. Blake.* 206

2. In an action against a surgeon for the negligent and unskillful treatment of a dislocated arm, the defendant claimed "consecutive luxation" or displacement after an

actual reduction.—*Held*, that it was not competent to ask a surgical witness, who had heard the testimony of surgeons and others having knowledge of the injury and condition of the arm, whether from the facts sworn to, he believed there had been "consecutive luxation." *Id.*

3. And per DWIGHT, J., a question of this character to be admissible, must be an hypothetical one, based either upon the hypothesis of the truth of all the evidence given in the case, or upon an hypothesis, specially framed, of certain facts assumed to be proved for the purpose of the inquiry. *Id.*

4. A witness called by the prosecution on the trial of a criminal action, upon a direct examination, gave material testimony against the prisoner, but a cross-examination was rendered impossible by reason of her sudden illness, and incapacity to testify further.—*Held*, the prisoner's counsel objecting, and claiming to have it stricken out, that it was error to submit the testimony so given to the jury. *Cole v. The People.* 370

5. Where the right to cross-examine is lost without fault, or waiver by the party entitled, the testimony of the witness should be stricken out. (Per MULLIN, J.) *Id.*

6. The case of *Forrest v. Kissam* (7 Hill, 463), distinguished, and some of the dicta therein disapproved. *Id.*

See EVIDENCE, 7.
JURY AND JURY TRIAL.
WILL, 1, 2, 3.

WORK, LABOR, AND SERVICES.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, 5.

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